CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 260

DIXIE OHIO EXPRESS COMPANY, APPELLANT,

vs.

STATE REVENUE COMMISSION OF GEORGIA ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

FILED AUGUST 8, 1938.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1938.

—8512

[fol. 1] **IN SUPERIOR COURT OF FULTON COUNTY**

Execution—Filed August 23, 1937

To All and Singular, the Sheriffs and Constables of this State, Greeting:

You are hereby commanded, That of the goods and chattels, lands and tenements of Dixie-Ohio Express Company, a corporation, you cause to be made by levy and sale sufficient thereof to make the sum of sixty-seven dollars and fifty cents ($67.50), being the amount of principal tax, and penalty, found and adjudged by the State Revenue Commission, and the director of the motor vehicle division of said State Revenue Commission to be due by the said Dixie-Ohio Express Company as maintenance tax for the period of time beginning April 1, 1937, and ending December 31, 1937, for the operation on and over the public roads of said State of Georgia a certain truck or motor vehicle for the transportation of property for hire and more particularly described as follows:

One truck manufactured by International Motor Company, van type body with pneumatic tires serial number —, motor number FAB. 38243, and manufacturer's rated capacity two tons; the said truck being owned and operated by the said Dixie-Ohio Express Company agents and representatives. The said tax is levied by virtue of and pursuant to that act of the General Assembly of Georgia approved March 30, 1937 (Georgia Laws 1937, pp. 155 to 167) generally known as the "Maintenance Tax Act." The principal of said tax is $56.25 and the penalty is $11.25 and is levied for failure to pay said tax when the same became due.

You will also make or cause to be made the sum of fifty [fol. 2] cents for this fi. fa. together with interest at the rate of 7% per annum from and after the 15th day of July, 1937, and have the said several sums to be paid the State Revenue Commission on collection thereof to be rendered the State of Georgia, the principal, penalty, interest and cost aforesaid and have you then and there this writ.

Witness the Honorable J. B. Jones, Chairman, State Revenue Commission, and given under the hand and official

signatures of the State Revenue Commission, and of each member thereof, this the 21st day of August, A. D. 1937.

State Revenue Commission, by J. B. Jones, Chairman; by W. B. Harrison, Vice-Chairman; by T. Grady Head, Commissioner; Marcus P. McWhorter, Director Motor Vehicle Division of State Revenue Commission.

[File endorsement omitted.]

[fol. 3] SHERIFF'S RETURN

GEORGIA,
Fulton County:

I have this day executed the within execution by levying upon the following described property to wit:

One International Automobile Truck, Motor No. FAB 38243. Levied on as the property of Dixie-Ohio Express Company to satisfy an execution issued by the State of Georgia in favor of State Revenue Commission, for maintenance tax beginning April 1, 1937, and ending December 31, 1937, vs. the said Dixie-Ohio Express Company. Property pointed out by plaintiff's attorney. Tenant in possession notified.

This August 21, 1937.

R. E. Warwick, Deputy Sheriff Fulton County.

[fol. 4] IN SUPERIOR COURT OF FULTON COUNTY

STATE REVENUE COMMISSION

versus

DIXIE-OHIO EXPRESS COMPANY

Execution for $56.25 principal and $11.25 penalty, issued by the State Revenue Commission acting under authority of an act of the Legislature approved March 30, 1937, which act provides for the levy of a maintenance tax on the owners of trucks operating over the roads of Georgia.

AFFIDAVIT OF ILLEGALITY—Filed August 23, 1937

GEORGIA,
Fulton County:

Personally appeared before the undersigned officer, duly authorized to administer oaths, Allan Watkins, who, after being duly sworn, deposes and says that he is attorney-in-fact for the defendant in fi. fa., Dixie-Ohio Express Company, and that he has been authorized to execute this affidavit of illegality. Affiant further states that Dixie Ohio Express Company is the defendant in fi. fa. in the above stated case and that the execution therein has been levied by James I. Lowry, sheriff of Fulton County, on certain property described as follows:

A 2-ton International truck, van type body, Motor No. FAB 38243, with pneumatic tires.

That the above described property is owned by Dixie Ohio Express Company and that the said execution did issue illegally and is proceeding illegally against the defendant in fi. fa. for the following reasons, to wit:

1

The execution as issued and levied is proceeding illegally against the property of defendant in fi. fa. for the reason that the act of the legislature approved March 30, 1937, and known as the Maintenance Tax Act, under which act the execution is issued, is invalid as applied to the Dixie Ohio [fol. 5] Express Company because the provisions of said act violate article I, paragraphs II and III of the Constitution of Georgia and in addition violates article 1, section 8, paragraph 3 of the Constitution of the United States and also section I of the fourteenth amendment to the Constitution of the United States.

2

The defendant Dixie Ohio Express Company is a corporation organized under the laws of Ohio with its principal office and place of business in Akron, Ohio. Defendant is engaged solely in the transportation business by motor vehicle as a common carrier of commodities general. Defendant operates its motor vehicles into and through the States of Ohio, Kentucky, Tennessee, Georgia, Alabama,

Pennsylvania and New York. The defendant's transportation business in Georgia and in all the other States is entirely interstate and defendant does no intrastate transportation business whatsoever. Defendant has complied with all the State laws and regulations with the exception of the law challenged herein. The defendant operates under a certificate of convenience and necessity issued by the Interstate Commerce Commission and has complied with all the provisions of the Federal Motor Carrier Act of 1935.

3

All of the operations of the defendant in Georgia are entirely interstate. Defendant hauls commodities from Akron, Ohio, to various points in Georgia and picks up freight in Georgia bound for destinations in States north of Georgia. A description of the routes traveled in Georgia will be more particularly set out hereinafter. The truck levied on in this suit brought a load of freight from Akron, Ohio, to Atlanta, Georgia, and operated over the highways of the States of Ohio, Kentucky, Tennessee, and Georgia. [fol. 6] This truck has made several trips into the State of Georgia since January 1, 1937, and also since the effective date of the maintenance tax act of 1937.

4

Under the Maintenance Tax Act approved March 30, 1937 (Georgia Laws, 1937, page 155) the legislature classified private carrier in one group and contract or common carriers in another group, and placed a graduated tax on each type vehicle based on what is terms manufacturer's rated capacity. Some of the taxes are as follows:

Manufacturer's Rated Capacity	Private Carrier	Contract or Common Carrier
1 Ton or less	$5.00	$10.00
1 Ton	$10.00	$20.00
1½ Ton	$15.00	$50.00
2 Ton	$30.00	$75.00
2½ Ton	$37.50	$100.00
3 Ton	$45.00	$125.00
7 Ton	$1125.00	$1250.00

Tags must also be purchased for trailers and the fee for them is graduated according to empty factory weight.

Neither tractors nor trailers pay fees on the basis of actual weight.

5

Manufacturers rated capacity has no relationship to the actual weight of the vehicle and therefore there is no relationship between the rated capacity of such vehicle and the amount of wear and tear that each vehicle will cause to the highways by its use thereof. The truck of a rated capacity of one ton may weight far in excess of a truck [fol. 7] with a rated capacity of two or three tons. A truck of rated capacity of one ton may have a carrying capacity of five tons. Rated capacity depotes the power of the motor and not the weight or carrying capacity of the body of the truck. A one and one-half ton tractor weighs far less than a one and one-half ton straight truck. A trailer must also purchase a tag, the price on which is based on empty factory weight. A one-and-one-half tractor and a 4000 pound trailer must pay twice or three times the fee of a one and one-half ton straight truck and the straight truck causes more damage to the highway because of the concentration of weight. Neither rated capacity nor factory weight has any relationship to actual weight or carrying capacity of the vehicle and such fees are unreasonable charges for the use the defendant makes of the highways of Georgia.

6

Under the maintenance tax act of 1937 the tax for private trucks is much less than the tax for trucks engaged in contracts hauling or operated as common carriers. In addition, the graduated increase for private trucks is out of proportion with the graduated increase on contract or common carriers. There are 69,503 private trucks operated over the highways of Georgia and there are only 2943 trucks operated over the highways of Georgia as contract or common carriers. Trucks operated as private carriers operate more miles per year over the highways of Georgia than the common carriers or the contract carriers operate over the highways of Georgia. No distinction is made as to carriers engaged in interstate or intrastate commerce, whether common, contract or private. Resident and non-resident carriers are equally taxed and licensed whether they make one trip or one thousand trips. The tax act herein attacked discriminates in favor of private carriers

and against contract and common carriers in violation [fol. 8] of article I, section II of the Constitution of Georgia and also of the commerce clause of the Fourteenth Amendment to the Constitution of the United States.

7

The execution and levy herein under the Maintenance Tax Act of 1937 are for the purpose of collecting a tax alleged to be due for a 1936 International, straight van truck, with a manufacturers rated capacity of two tons. An eventual condemnation bond of $100.00 is tendered to the sheriff making the levy along with this affidavit of illegality under the provisions of Code section 92-7301 of the 1933 Code of Georgia.

8

Dixie Ohio Express Company operates approximately one hundred trucks which come in and out of the State of Georgia at various intervals, travelling between Georgia and Ohio and New York. Because of the inconvenience of making the levy on each and every truck of the defendant, an agreement was entered into whereby the State Revenue Commission has allowed the defendant to deposit in escrow the amount of money alleged to be due on each vehicle under the Maintenance Tax law of 1937 and has agreed that levy should be made against only one truck and the remaining trucks upon which a deposit has been made or will be made would be included in the case herein. Deposits are made as the trucks come into the State of Georgia. The State Revenue Commission further agreed with the defendant that the present case, in which there is an actual levy, shall govern all the other cases in which deposit has been made. Under these circumstances the entire operations of the defendant in fi. fa. are to be considered in this case.

9

The particular truck levied on and all the other trucks [fol. 9] owned by Dixie Ohio Express Company and operated in the State of Georgia have purchased a $3.00 Georgia license plate as required by Code section 68-211 of the 1933 Code as amended by the Legislature in 1935 (Georgia Acts, 1935, page 157). Under the provisions of the laws of Georgia the funds derived from the sale of these $3.00 license fees are placed in the State treasury, to be used by the High-

way Department for the purpose of constructing and maintaining the State Highway System and State Aid Roads after the expenses of the Revenue Commission have been first deducted. The State Revenue Commission collected $1,305,999.71 from the sale of $3.00 license plates during the year 1936. $1,209,495.05 of this fund was allocated to the State Highway fund. The remainder was used to pay the expenses of the Revenue Commission and sheriff's fees.

10

The particular truck levied on herein and all the other trucks operated by Dixie Ohio Express Company in Georgia have registered with the Georgia Public Service Commission and obtained permission to operate in the State of Georgia as an interstate common carrier and have purchased Georgia Public Service carrier plates. The fee required is $25.00 for each truck and is due annually on or before January 1. Defendant in fi. fa. has purchased approximately one hundred of these plates for the year 1937. Under the provision of the Georgia law the expenses of the Georgia Public Service Commission and its employees are to be paid out of the fund received from the sale of these $25.00 carrier plates and any amount over and above the expenses so paid is under the law required to be paid to the State Highway Department for the construction and maintenance of the State Highway System or State Aid roads. The Georgia Public Service Commission collected $73,565 [fol. 10] in 1936 as registration fees under the motor common carrier act of 1931 (Section 68-623, Georgia Code, 1933), which act requires each common or contract carrier to purchase a $25 carrier plate each year. Private carriers are not required to pay this fee. Of the amount collected in 1936 $28,341.12 was paid over to the Highway fund.

11

Under the motor carrier act and the motor common carrier act of 1933 only carriers engaged in intrastate commerce are required to obtain a certificate of public convenience and necessity and the carriers engaged exclusively in interstate commerce are required only to register, pay the $25.00 annual fee per truck, and file the required insurance policies. The Georgia Public Service Commission has no power to regulate rates or routes of interstate car-

riers. Little or no regulatory supervision is required with respect to carriers engaged exclusively in interstate commerce. Interstate and intrastate common or contract carriers pay the annual $25.00 registration fee, part of which is to defray expenses of the Commission and the remainder for highway maintenance.

12

Under the Motor Fuel Tax Law as amended by the 1937 legislature, a tax of six cents per gallon is levied on each gallon of gasoline sold in the State of Georgia. The user is the taxpayer. Of this six cents four cents per gallon is required by statute to be set aside for a State Highway fund to be used for the construction and maintenance of the State Highway System of roads or State Aid roads. The defendant in fi. fa. purchases more than 90,000 gallons of gasoline in the State per year and therefore pays $5,400.00 in gasoline taxes to the State of Georgia out of which $3,600 go directly to the maintenance of State Aid highways over [fol. 11] which defendant's trucks travel. The total gasoline tax paid to the State for the year 1936 by all motor vehicles was $17,525,616.25 and of this sum $11,255,805.68 was remitted to the Highway Department.

13

The defendant in fi. fa. owns approximately one hundred pieces of truck equipment, including one-half ton, two-ton straight trucks, one and one-half and two-ton tractors, that are used to pull trailers weighing approximately 4,000 pounds. At the present time something over $3,000.00 has been deposited under the agreement with the Revenue Commission and probably that sum will exceed $4,000.00 before January 1, 1938. For the year 1938 and each year thereafter the full amount of tax will be collectible before February 1 and it will cost the defendant approximately $6,000.00 yearly. The act provides that only three-fourths of the tax should be payable for the year 1937.

14

Defendant travels through seven States and the general average of miles traveled by its trucks throughout its entire operations is 6,870,000 miles per year. The yearly average miles traveled in Georgia is 725,000. The greater

number of miles traveled in Georgia consists of trips from the Georgia-Tennessee line near Chattanooga, Tennessee, to Atlanta, Georgia, and return. This trip is made entirely over highways included in the State highway system or known as State aid highways from the Tennessee line to Atlanta, Georgia, via Dalton, Calhoun, Cartersville and Marietta. Other highways traveled by the defendant are shown in Exhibit A attached hereto and made a part of this paragraph of this petition. All of the Georgia highways over which the trucks of the defendant travel are State aid highways and are a part of the State Highway System. Less [fol. 12] than eleven per cent of the entire mileage traveled by Dixie Ohio Express Company is traveled in the State of Georgia. Georgia collects far more than eleven per cent of the entire taxes paid to all the seven States through which the defendant operates. If the other six States through which the defendant operates collected the same amount of taxes as is levied by Georgia, including the maintenance tax, this defendant could not operate as its taxes and expenses would greatly exceed its gross revenue. The defendant is not complaining of the $25.00 Public Service Commission fee, the gasoline tax, or the $3.00 license fee, but when the enormous maintenance taxes are added to the sum exacted for those fees the entire taxes paid become prohibitive.

15

That because of the nature and fluctuation of the defendant's business, there are trucks that enter the State for only one trip and under requirements of the Maintenance Tax Act of 1937, these trucks would be required to buy a maintenance tag. In addition, if a tag has been purchased by the defendant for a truck and this truck is sold or destroyed the tag is non-transferrable and the tax is paid for a vehicle that can not use the highway. An average of 25 trucks is sold or destroyed each year. Such regulations show that the primary purpose of the act is to tax this defendant and not to obtain a fee commensurate with its use of the highway.

16

The Georgia Maintenance Tax Act approved March 30, 1937, and effective April 1, 1937, allocates all the money received from the sale of the tags to the United States Rural Post Roads of Georgia and such funds are "to be expended

through the director thereof and the said money shall be pro rated among the several counties of this State accord-
[fol. 13] ing to the number of miles of rural post roads in said counties." The defendant operates through counties which have little or practically no United States Rural Post Roads in them and in addition this defendant does not operate its trucks on any of the rural post roads. As a result, defendant is taxed for the purpose of building highways which it does not and can not use as defendant's operations are now limited by its I. C. C. permit over the highways that it traveled on or before June 1, 1935.

17

United States Rural Post Roads are defined by an act approved March 18, 1937, and effective upon approval. Section 8 of said act defines rural post roads as follows:

"The term Rural Post Roads shall mean all roads and highways in the several counties of the State of Georgia over which the U. S. mail is carried not included in the present highway system. The term farm to market roads in this act shall mean all public roads and highways in the several counties of the State of Georgia other than U. S. Post Roads and/or State Aid Roads."

18

This defendant pays to the State of Georgia each year approximately $300.00 for the State $3.00 license plate, $2500.00 for the $25.00 Public Service Commission carrier plate, $5,400.00 in gasoline taxes and the funds are used to defray expenses of regulation and to maintain the State Highway System. In addition to this, the Federal Government contributed $5,343,711.28 in 1935 and $3,721,489.90 in 1936 for improvement and construction of Georgia roads. These Federal funds and the other motor vehicle taxes are used to construct highways over which defendant operates. The maintenance tax funds are allocated to roads over which defendant never travels.

[fol. 14] 19

In 1936 the total taxes collected by the State of Georgia amounted to $30,058,092.68. The motor vehicles operated in the State paid $19,207,909.59 in license and motor fuel

taxes. The motor vehicles paid over sixty-two per cent. of the entire taxes collected by the State.

20

Said maintenance tax act effective April 1, 1937, is unconstitutional and void in the following particulars, to-wit:

(a) Said tax discriminates against common and contract carriers in favor of private carriers and the tax is so exhorbitant as to be confiscatory and as such is in violation of article I, paragraphs II and III of the Constitution of Georgia, which read:

"Protection to person and property is the paramount duty of government, and shall be impartial and complete.

"No person shall be deprived of life, liberty, or property, except by due process of law."

(b) Said tax is an unreasonable fee exacted for the use defendant makes of the highways and therefore is a direct burden on interstate commerce and in addition it is a tax on the privilege of doing an interstate transportation business and as such is in violation of article I, section 8, paragraph 3 of the Constitution of the United States, which provides: "The Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

(c) Said tax is so far in excess of what is a reasonable fee for the use of the highway by this defendant that the same is confiscatory and as such is in violation of the due process clause of section 1 of the Fourteenth Amendment to the United States Constitution, reading: "No State shall make or enforce any law which shall abridge the privilege [fol. 15] or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within his jurisdiction the equal protection of the laws."

(d) Said tax lays an unequal burden on common carriers and discriminates against common carriers in favor of private carriers in that the maintenance tax is less for private carriers than for common carriers and for this reason the tax violates the equal protection clause of section 1 of the Fourteenth Amendment to the Constitution of the United States.

(e) Said tax is a tax for the use of the highways by the defendant who is engaged exclusively in interstate commerce and as it lays a difference tax on trucks of private carriers engaged in interstate commerce than upon identical trucks of the defendant common carrier said tax discriminates in favor of private carriers against common carriers and a burden on interstate commerce in violation of the commerce clause of the Constitution of the United States.

Wherefore, the defendant in fi. fa. prays that this its illegality to said execution be sustained, that said execution be declared null and void and that all levies and other acts under the maintenance tax act of 1937 be annulled.

Dixie Ohio Express Company, by Allen Watkins, Attorney-in-fact for said Corporation. Watkins, Grant & Watkins, Attorneys for Dixie Ohio Express Co.

[fol. 16] Sworn to and subscribed before me this 21st day of August, 1937. Lucille H. Printup, Notary Public, Georgia, State at Large. (N. P. Seal.)

[fol. 17] EXHIBIT "A" TO AFFIDAVIT OF ILLEGALITY

From the Georgia-Tennessee line near Chattanooga to Ringgold, Dalton, Calhoun, Cartersville, Atlanta, Newnan, Hogansville, LaGrange and West Point via Georgia Highways No. 3, No. 14.

From the Georgia-Tennessee line over routes described above to Atlanta, Jonesboro, Griffin, Barnesville, Forsyth and Macon via Georgia Highways No. 3, No. 7, No. 19.

From the Georgia-Tennessee line over routes described above to McDonough, Jackson, Forsyth, Macon via Georgia Highways No. 3, No. 42, No. 19.

From the Georgia-Tennessee line to Atlanta over routes described above to Griffin, Zebulon, Thomaston, Americus, Albany, via Georgia Highway No. 3.

From the Georgia-Tennessee line to Atlanta over routes described *about* to Newnan, Greenville, Chipley, Columbus via Georgia Highways No. 3, No. 14, No. 41, No. 18, No. 1.

From the Georgia-Tennessee line over routes described above to Newnan, Greenville, Warm Springs and Manchester via Georgia Highways No. 3, No. 14, No. 41.

From the Georgia-Alabama line to Atlanta via Bremen, Villa Rica, Douglasville, Austell, via Georgia Highway No. 8.

From the Georgia-Alabama line over Georgia Highway No. 6 to Cedartown, Rockmart, then over Georgia Highway No. 113 to Cartersville, Georgia Highway No. 3 to Georgia-Tennessee line.

From Georgia-Alabama line over Georgia Highway No. 6 to Cedartown, Georgia Highway No. 1 to Rome, Georgia Highway No. 53 to Calhoun and Georgia Highway No. 3 to Georgia-Tennessee line.

Georgia-Alabama line over Georgia Highway No. 8 to Bremen, Atlanta, Lawrenceville, Winder, Athens, then over Georgia Highway No. 10 to Lexington, Washington, Thom-
[fol. 18] son, Augusta.

Georgia-Tennessee line to Atlanta over routes described above to Avondale, Conyers, and Covington via Georgia Highways No. 3, No. 12.

Georgia-Alabama line to Georgia-Tennessee line via Trenton over Georgia Highway No. 58.

Atlanta, Georgia, to Austell to Dallas to Rockmart to Cedartown to Rome to Calhoun to Georgia-Tennessee line via Georgia Highways No. 8, No. 6, No. 1, No. 53, No. 3 (or from Rome to Georgia-Tennessee line via Georgia Highway No. 1).

All of the highways above are part of the Georgia Highway System of State roads and are State aid roads. A major portion of the funds given to the State by the Federal Government has been used to construct and maintain these roads.

[File endorsement omitted.]

[fol. 19] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER TO AFFIDAVIT OF ILLEGALITY—Filed August 31, 1937

Come now the State Revenue Commission and J. B. Jones, W. B. Harrison and T. Grady Head, the members thereof, and Marcus P. McWhorter, Director of the Motor

Vehicle Division of said Commission, plaintiff in fi. fa. in the above stated case and before filing a traverse therein demur to the affidavit of illegality filed by the defendant in fi. fa. on the grounds following, to-wit:

1

Said affidavit as filed by the defendant in fi. fa. sets out no valid or legal cause of illegality to the execution issued and levied, and sets out no such facts as constituted a legal defense thereto or show that said fi. fa. is proceeding illegally. The allegations of said affidavit are wholly insufficient to show, either, that said fi. fa. did issue illegally, or that the same is proceeding illegally.

2

The allegations of fact as set out in said affidavit of illegality do not support or justify the legal conclusions asserted therein and are wholly insufficient to authorize or justify the relief prayed for.

3

Plaintiff in fi. fa. specially demurs to and moves to strike the first paragraph of the illegality on the ground that the allegations therein made set forth conclusions of law only unsupported by any facts alleged in said paragraph or else-
[fol. 20] where in said affidavit.

4

Plaintiff in fi. fa. demurs to and moves to strike the second paragraph of the affidavit of illegality on the ground that the facts therein alleged, if true, are irrelevant and immaterial and do not, whether taken alone or in connection with other allegations of fact in said affidavit legally justify a holding that the fi. fa. in question did issue illegally or that the same is proceeding illegally.

5

Plaintiff in fi. fa. specially demurs to and moves to strike the fifth paragraph of the affidavit of illegality on the grounds following, to wit:

A. The facts in said paragraph set out, if true, are irrelevant and immaterial, and do not, whether taken alone of

in connection with other allegations of the affidavit legally justify a holding by the court that the fi. fa. in question did issue illegally or is proceeding illegally.

B. Plaintiff specially demurs to and moves to strike from said paragraph the first sentence thereof reading as follows:

"Manufacturer's rated capacity has no relationship to the actual weight of the vehicle and therefore there is no relationship between the rated capacity of such vehicle and the amount of wear and tear that each vehicle will cause to the highway by its use thereof,"

on the ground that said allegation sets out a conclusion contrary to matters of common knowledge and of which the Court will take judicial cognizance.

C. Plaintiff demurs to and moves to strike the second sentence of the fifth paragraph of said affidavit of illegality reading as follows: "A truck of a rated capacity of one ton may weigh far in excess of a truck with a rated capacity [fol. 21] of two or three tons," on the ground that such allegation, if true, is irrelevant and immaterial and does not whether taken alone or in connection with other allegations of fact set out in the affidavit justify the holding that the fi. fa. in question did issue illegally or is proceeding illegally.

D. Plaintiff demurs to and moves to strike the following sentence in said paragraph 5 reading as follows, to-wit: "A one and one-half ton tractor weighs far less than a one and one-half ton straight truck. A trailer must also purchase a tag the price of which is based on empty factory weight. A one and one-half ton tractor and a 4,000 lb. trailer must pay twice or three times the fees of a one and one-half ton straight truck and the straight truck causes more damage to the highway because of the concentration of weight," on the ground that said allegations, if true, are irrelevant and immaterial and do not, whether taken alone or in connection with other allegations of the affidavit, justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally.

E. Plaintiff specially demurs to and moves to strike that portion of the last sentence of said fifth paragraph of the

affidavit reading as follows: "Neither rated capacity nor factory weight has any relationship to actual weight or carrying capacity of the vehicle," on the ground that said allegation sets out a conclusion contrary to what is a matter of common knowledge of which the Court will take judicial cognizance.

F. Plaintiff specially demurs to that part of the last sentence of said fifth paragraph of the affidavit reading as follows: "Such fees are unreasonable charges for the use the defendant makes of the highways of Georgia," on the ground that said allegation sets forth a conclusion unsupported by allegations of fact.

[fol. 22] 6

Plaintiff specially demurs to certain portions of the sixth paragraph of the affidavit on the grounds as hereinafter set out, to wit:

A. Plaintiff demurs to and moves to strike the first sentence of said paragraph reading as follows: "Under the maintenance tax act of 1937 the tax for private trucks is much less than the tax for trucks engaged in contract hauling or operated as common carriers," on the ground that said allegation sets forth a conclusion of the pleader only and besides the allegation as made, if true, is irrelevant and immaterial and does not justify a holding that the execution in question did issue illegally or in proceeding illegally, whether taken alone or in connection with other allegations.

B. Plaintiff demurs to the second sentence of said paragraph reading as follows: "In addition, the graduated increase for private trucks is out of proportion with the graduated increase on contract or common carriers," on the ground that said allegation sets forth a conclusion of the pleader only and if true is irrelevant and immaterial and does not justify a holding that said fi. fa. did issue illegally or is proceeding illegally.

C. Plaintiff demurs to and moves to strike that portion of the sixth paragraph of the affidavit reading as follows: "There are 69,503 private trucks operated over the highways of Georgia and there are only 2943 trucks operated over the highways of Georgia as contract or common car-

riers. Trucks operated as private carriers operate more miles per year over the highways of Georgia than the common carriers or the contract carriers operate over the highways of Georgia. No distinction is made as to carriers engaged in interstate or intrastate commerce, whether com-
[fol. 23] mon, contract, or private. Resident and non-resident carriers are equally taxed and licensed whether they make one trip or one thousand trips," on the ground that said allegations set forth conclusions of the pleader only and if true are wholly irrelevant and immaterial and do not justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally whether taken alone or in connection with other allegations of the affidavit.

D. Plaintiff demurs to the last sentence of the sixth paragraph of said affidavit reading as follows: "The tax act herein attacked discriminates in favor of private carriers and against contract and common carriers in violation of article 1, section 2, of the constitution of Georgia and also of the commerce clause of the fourteenth amendment to the Constitution of the United States," on the ground that said allegations set forth conclusions of law which are not supported by allegations of fact.

7

Plaintiff demurs to and moves to strike the ninth paragraph of said affidavit on the ground that the facts therein alleged, if true, are wholly irrelevant and immaterial and do not justify a holding on the part of the Court that the fi. fa. in question did issue illegally or is proceeding illegally, whether such allegations be taken alone or in connection with other allegations of the affidavit.

8

Plaintiff demurs to and moves to strike the tenth paragraph of the affidavit of illegality on the ground that the facts therein alleged, if true, are wholly irrelevant and immaterial, and, whether taken alone or in connection with other allegations of said affidavit, justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally.

[fol. 24] 9

Plaintiff specially demurs to and moves to strike the eleventh paragraph of the affidavit on the ground that the

allegations therein made, if true, are irrelevant and immaterial, and do not, whether taken alone or in connection with other allegations of the affidavit, justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally.

10

Plaintiff specially demurs to and moves to strike the twelfth paragraph of the affidavit on the ground that the facts therein alleged, if true, are wholly irrelevant and immaterial, and do not, whether taken alone or in connection with other allegations of the affidavit, legally justify a holding on the part of the Court that the fi. fa. in question did issue illegally or is proceeding illegally.

11

Plaintiff specially demurs to and moves to strike the thirteenth paragraph of the affidavit on the ground that the facts therein alleged, if true, are wholly irrelevant and immaterial and, whether taken alone or in connection with other allegations of the affidavit, do not justify a holding by the Court that the fi. fa. in question did issue illegally or is proceeding illegally.

12

Plaintiff specially demurs to and moves to strike the fourteenth paragraph of the affidavit on the ground that the allegations of fact as therein made are irrelevant and immaterial and whether taken alone or in connection with other allegations of the affidavit do not justify a holding by the Court that the fi. fa. in question did issue illegally or is proceeding illegally.

[fol. 25] 13

Plaintiff demurs to and moves to strike the fifteenth paragraph of the affidavit on the ground that the allegations of fact as therein made, if true, are irrelevant and immaterial and do not justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally.

14

Plaintiff demurs to and moves to strike the sixteenth paragraph and particularly that portion thereof reading as

follows: "The defendant operates through counties which have little or practically no United States Post Roads in them, and in addition this defendant does not operate his trucks on any of the Rural Post Road," on the ground that the allegations of said paragraph and particularly that allegation quoted, if true, are irrelevant and immaterial and do not justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally.

15

Plaintiff specially demurs to and moves to strike the seventeenth paragraph of the affidavit on the ground that the allegations therein made are irrelevant and immaterial and show no ground or reason for arresting the proceeding under the fi. fa. in question.

16

Plaintiff demurs to and moves to strike the eighteenth paragraph of the affidavit on the ground that the allegations of fact as therein made, if true, are irrelevant and immaterial and do not, whether taken alone or in connection with other allegations of the affidavit, disclose any cause or ground for holding that the fi. fa. in question did issue illegally or is proceeding illegally.

17

Plaintiff demurs to and moves to strike the nineteenth [fol. 26] paragraph of the affidavit on the ground that the allegations of fact as therein made, if true, are irrelevant and immaterial and do not disclose any ground or cause for holding that the fi. fa. in question did issue illegally or is proceeding illegally.

18

Plaintiff demurs to and moves to strike the twentieth paragraph of the affidavit including subdivisions A, B, C, D and E thereof on the ground that the allegations of said paragraph set forth only conclusions of law wholly unsupported by allegations of fact.

Wherefore, plaintiff in fi. fa. prays the judgment of the court on this its demurrer and that the Court adjudge that said affidavit of illegality is insufficient in law and sets

forth no defense and that the same be dismissed at the cost of the defendant in fi. fa.

M. J. Yeomans, Attorney General; D. M. Parker, Assistant Attorney General; O. H. Dukes, Assistant Attorney General, Attorneys for Plaintiff in Fi. Fa.

[File endorsement omitted.]

[fol. 27] In Superior Court of Fulton County

[Title omitted]

Amendments to Affidavit of Illegality—Filed October 1, 1937

Comes now Dixie Ohio Express Company, defendant in fi. fa. in the above styled proceeding and with leave of court first had and obtained, amends its affidavit of illegality heretofore filed as follows:

1

To amend paragraph 4 so that said paragraph shall read as follows:

"Under the Maintenance Tax Act approved March 30, 1937 (Georgia Laws, 1937, page 155), the Legislature classified the carriers in two groups (1) Known as those trucks or vehicles not used as a common or contract carrier for hire, and (2) Those vehicles used as common or contract carriers for hire and placed a graduated tax on each type vehicle based on what is termed manufacturers' rated capacity. Some of the taxes included therein are as follows:

Manufacturers' Rated Capacity	Not for Hire Carrier	Contract or Common Carrier for Hire
1 ton or less	$5.00	$10.00
1 ton	$10.00	$20.00
1½ ton	$15.00	$50.00
2 ton	$30.00	$75.00
2½ ton	$37.50	$100.00
3 ton	$45.00	$125.00
7 ton	$1125.00	$1250.00

Tags must also be purchased for trailers and the fee for them is graduated according to empty factory weight and the fee for not for hire carriers is correspondingly less than those for the for hire carriers. Neither tractors nor trailers [fol. 28] pay fees on the basis of actual weight."

2

To amend paragraph 6 of said affidavit to read as follows: "Under the Maintenance Tax Act of 1937 the tax for not for hire trucks is much less than the tax for trucks operated for hire. In addition, the graduated increase for the not for hire trucks is out of proportion with the graduated increase on the for hire trucks. There are 69,503 not for hire trucks operated over the highways of Georgia and there are only 2,943 trucks operated in Georgia as carriers for hire. Trucks operated as not for hire carriers travel more miles per year over the highways of Georgia than do the carriers for hire. No distinction is made as to carriers engaged in interstate or intrastate commerce, whether carriers for hire or carriers not for hire. Resident and non-resident carriers are equally taxed and licensed, whether they make one trip or one thousand trips. The tax act herein attacked discriminates in favor of not for hire carriers and against the for hire contract and common carriers in violation of article 1, section 2 of the Constitution of Georgia and also the commerce clause and the Fourteenth Amendment to the Constitution of the United States."

3

To amend the next to the last sentence of paragraph 10 to read: "Not for hire carriers are not required to pay this fee."

4

To amend paragraph 19 by adding to said paragraph the following: "For the same year the State of Georgia spent $11,127,258.38 for highway construction and maintenance and of this sum extended the Federal Government contributed $3,721,489.90."

[fol. 29] 5

To add a new paragraph, to be known as 19-A, to read as follows:

"The 1937 legislature of Georgia passed an act to create a Department of Public Safety for Georgia (Georgia Laws, 1937, page 322). This act provides for a State Highway Patrol in charge of various safety regulations upon the highways. In addition, this act requires a driver's license for chauffeurs operating vehicles for hire. The fee for this license is $2.00 for a period of two years. The proceeds of all fees obtained by the driver's licenses are to be used to defray the expenses of the Department of Public Safety."

6

To amend paragraph 20, sub-section (a) so that the same shall read as follows:

"Said tax discriminates against carriers for hire and in favor of carriers operating not for hire and the tax is so exhorbitant as to be confiscatory and as such is in violation of article 1, paragraphs 2 and 3 of the Constitution of Georgia, which read: 'Protection to person and property is the paramount duty of government, and shall be partial and complete.' Also: 'No person shall be deprived of life, liberty or property except by due process of law.'"

7

To amend sub-section (d) of paragraph 20 so that the same shall read as follows:

"Said tax lays an unequal burden on carriers for hire and discriminates against carriers for hire in favor of carriers not for hire in that the maintenance tax is far less for carriers not for hire than it is for the for hire carriers and for this reason the tax violates the equal protection clause of section 1 of the fourteenth amendment to the Constitution of the United States."

[fol. 30] 8

To amend sub-section (e) of paragraph 20 so that the same shall read as follows:

"Said maintenance tax is a tax for the use of the highways by the defendant in fi. fa., who is engaged exclusively in interstate commerce and as the act lays a different tax

on trucks operated not for hire who are engaged in interstate commerce than upon the identical type trucks operated by the defendant as a common carrier for hire, said tax discriminates in favor of the not hire carriers and against the common carriers for hire and therefore is an undue burden on interstate commerce in violation of the commerce clause of the Constitution of the United States."

Watkins, Grant & Watkins, Attorneys for Dixie Ohio Express Company.

[fol. 31] *Duly sworn to by Allan Watkins. Jurat omitted in printing.*

ORDER

The within amendment hereby allowed, subject to demurrer & obj.

This Oct. 1st, 1937.

Hugh M. Dorsey, Judge, Fulton Superior Court.

[File endorsement omitted.]

[fol. 32] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER TO AFFIDAVIT OF ILLEGALITY AS AMENDED—Filed November 5, 1937

An amendment to the affidavit of illegality originally filed by the defendant in the above stated case having been tendered and allowed, but subject to demurrer, comes now plaintiff in fi. fa. and demurs to said affidavit of illegality as amended on the grounds following, to-wit:

1

To the defendant's affidavit of illegality as amended, plaintiff in fi. fa. renews and insists upon each and every ground of demurrer taken and urged in its demurrer heretofore filed to the affidavit of illegality as originally filed, and whether taken and urged to the affidavit as a whole or separately to the several paragraphs thereof. The affidavit as amended sets out no valid or legal cause of illegality to the execution issued and levied, and sets out no such facts as constitute a legal defense thereto or show that the fi. fa. is proceeding illegally.

To the sixth paragraph of the affidavit of illegality as amended plaintiff renews its demurrer to said paragraph of the affidavit as originally filed and, in addition thereto, specially demurs to the said paragraph as amended on the grounds following to-wit:

(a) Plaintiff demurs to and moves to strike the first sentence of said paragraph as amended reading as follows: "Under the maintenance tax act of 1937 the tax for not for hire trucks is much less than the tax for trucks operated for hire," on the ground that said allegation sets forth only a conclusion of the pleader and on the further ground that [fol. 33] the allegation as made, if true, is irrelevant and immaterial, and whether taken alone or in connection with other allegations, does not justify a holding that the execution in question did issue illegally or is proceeding illegally.

(b) Plaintiff demurs to the second sentence of said paragraph as amended, reading as follows: "In addition, the graduated increase for the not for hire trucks is out of proportion with the graduated increase on the for hire trucks," on the ground that said allegation sets forth a conclusion of the pleader only, and, if true, is irrelevant and immaterial and does not justify a holding that said fi. fa. did issue illegally or is proceeding illegally.

(c) Plaintiff demurs to and moves to strike that portion of the sixth paragraph of the affidavit as amended, reading as follows: "There are 69,503 not for hire trucks operated over the highways of Georgia and there are only 2,943 trucks operated in Georgia as carriers for hire. Trucks operated as not for hire carriers travel more miles per year over the highways of Georgia than do the carriers for hire. No distinction is made as to carriers engaged in interstate or intrastate commerce, whether carriers for hire or carriers not for hire. Resident and non-resident carriers are equally taxed and licensed, whether they make one trip or one thousand trips," on the ground that said allegations set forth conclusions of the pleader only and on the ground that said allegations as made, if true, are irrelevant and immaterial and do not justify holding that the fi. fa. in question did issue illegally or is proceeding illegally.

(d) Plaintiff demurs to the last sentence of the sixth paragraph of the affidavit as amended, reading as follows: "The

tax act herein attacked discriminates in favor of the not for hire carriers and against the for hire contract and common carriers in violation of Article I, section II of the Constitu- [fol. 34] tion of Georgia and also the commerce clause and the Fourteenth Amendment to the Constitution of the United States," on the ground that said allegations set forth conclusions of law not supported by any allegations of fact.

3

Plaintiff demurs to and moves to strike the tenth paragraph of the affidavit of illegality as amended on the ground that the facts therein alleged, if true, are wholly irrelevant and immaterial, and whether taken alone or in connection with other allegations of said affidavit, do not justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally.

4

Plaintiff demurs to and moves to strike the nineteenth paragraph of the affidavit of illegality as amended, on the ground that the allegations of fact therein made, if true, are irrelevant and immaterial and do not justify a holding or judgment to the effect that the fi. fa. in question did issue illegally or is proceeding illegally.

5

Plaintiff demurs to and moves to strike the paragraph of the affidavit of illegality as amended, designated 19-a, on the ground that the allegations as therein made, if true, are irrelevant and immaterial and do not justify a holding or judgment to the effect that the fi. fa. in question did issue illegally or is proceeding illegally. Besides, it clearly appears from the allegations as made in said paragraph and as well from the Act as a whole, of which the court will take judicial cognizance, that the license fee required to be paid under said act is not assessed against or chargeable to the defendant.

6

Plaintiff demurs to and moves to strike the twentieth paragraph of the affidavit as amended, including subdivisions (a), (b), (c), (d) and (e) thereof as amended, on [fols. 35-45] the ground that the allegations of said paragraph set forth only conclusions of law unsupported by allegations of fact.

Wherefore, plaintiff in fi. fa. prays the judgment of the court on its original demurrer and its renewal demurrer and that the affidavit of illegality, as amended, be stricken and that the fi. fa. proceed.

M. J. Yeomans, Attorney General; Dave M. Parker, Assistant Attorney General; O. H. Dukes, Assistant Attorney General, Attorneys for Plaintiff in fi. fa. State Revenue Commission.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

ORDER SUSTAINING DEMURRER

The within general demurrer to the affidavit of illegality as amended is hereby sustained and the petition ordered dismissed. The special demurrers are not passed upon.

Dec. 2, 1937.

Virlyn B. Moore, Judge, S. C. A. C.

[fol. 46] IN SUPREME COURT OF GEORGIA

No. 12230

DIXIE-OHIO EXPRESS COMPANY

v.

STATE REVENUE COMMISSION et al.

OPINION—June 17, 1938

By the COURT:

1. The maintenance-tax act of 1937 (Ga. L. 1937, pp. 155-167) is not void on the ground that it violates the equal-protection clause, or the due-process clause as embodied in article 1, section 1, par. 2, 3, of the constitution of this State. Code, §§ 2-102, 2-103.

2. Neither is said act violative of the commerce clause as embodied in article 1, section 8, paragraph 3, of the Constitution of the United States. Code, § 1-125.

3. Nor is said act violative of section 1 of the 14th amendment of the constitution of the United States inhibiting the passage of laws abridging the privileges or immunities of citizens. Code, § 1-815.

The State Revenue Commission of Georgia issued a fi. fa. against Dixie-Ohio Express Company and caused the same to be levied by a sheriff of Fulton County on property of the company. The fi. fa. was issued for the amount of a license fee or a maintenance tax alleged to be due by the Dixie Ohio Express Company, under the maintenance-tax act of 1937, for a truck operated by that company over certain highways of Georgia. After levy the defendant in fi. fa. filed with the sheriff an affidavit of illegality, and gave bond for the eventual condemnation-money. A gen- [fol. 47] eral demurrer to this affidavit was filed by the State Revenue Commission, and after hearing the court sustained the demurrer and dismissed the affidavit. To this ruling the defendant excepted. The affidavit of illegality alleges that the levy is proceeding illegally against the defendant in fi. fa. because the 1937 maintenance-tax act which authorized the tax is unconstitutional, in that it violates the provisions of both the State and Federal constitutions.

Briefly stated, the affidavit contains the following allegations: The Express Company is an Ohio corporation with its principal office and place of business in that State. It is engaged in the business of transporting property by motor vehicle as a common carrier for hire between the States of Ohio, Pennsylvania, New York, Kentucky, Tennessee, Alabama, and Georgia. It is engaged entirely in interstate commerce, and does no intrastate commerce whatever. It hauled commodities generally from places and points in Ohio to places in Georgia, and picked up freight in Georgia destined for the States north of Georgia. In operating over the highways of Georgia its trucks did not travel over any of the rural post roads of Georgia, as defined in the act of March 18, 1937, with respect to rural post roads; its trucks operated only over State-aid highways, mostly from Tennessee-Alabama line near Chattanooga to Atlanta; a permit issued to it by the Interstate Commerce Commission limited its operations over these highways; and under the Federal motor-carrier act of 1935 it could not operate over the rural post roads of Georgia. It owned approximately one hundred pieces of equipment, consisting of one and a half-

ton and two-ton straight trucks, and one and one-half-ton and two-ton tractors which were used to pull trailers weighing approximately 4,000 pounds; it purchased a $3 license [fol. 48] tag for each truck, and a $25 Georgia public-service tag for each truck, and purchased for each of its drivers a $2 chauffeur's license; and in addition to these taxes, it paid a tax of six cents per gallon for each gallon of gas purchased in the State of Georgia, and its purchases amounted to approximately 90,000 gallons of gas per year. The maintenance-tax act provides a tax of $50 on trucks of a manufacturer's rated capacity of one and one half tons, $75 for a manufacturer's rated capacity of two tons in the event that the trucks are operated as carriers for hire; and in the event they are operated as carriers not for hire, the corresponding fees would be $15 for a truck of a rated capacity of one and one half tons and $30 for a truck of a rated capacity of two tons.

It was further alleged that trailers are required to pay a fee graduated according to their empty factory weight, as set out in the maintenance-tax act of 1937; that the manufacturer's rated capacity and empty factory weight had no relationship to the actual weight of the vehicle and no relationship with respect to the use such vehicle would make of the highways of Georgia, because a truck of a rated capacity of one ton may weigh far in excess of a truck of a rated capacity of two or three tons, for rated capacity differs greatly from loaded capacity; that a combination of a tractor and trailer would pay a far greater fee than would a straight truck of approximately the same weight, even though the truck and trailer unit would cause less wear and tear on the highway than would the straight truck with a concentration of weight; that there was no relationship between the use made of the highway by these trucks and the tax levied, because there was a discrimination against carriers for hire in favor of carriers not for hire, for the fees of the latter are much less than the fees re- [fol. 49] quired of the former; that there were 69,503 carriers operating over the highways of Georgia as carriers not for hire, and only 2,943 trucks operated as carriers for hire; that the taxes already paid by the motor-vehicle industry more than paid the cost of maintaining and constructing the highways of the State over which the defendant in fi. fa. operates; that the State collected $1,305,999.71 from the

sale of the $3 tags, of which $1,209,495.05 was allocated to the State Highway Fund for State-aid roads, and the remainder was used for regulation purposes; that the Georgia Public-Service Commission collected $73,565 for registration fees, of which $28,341.12 was paid to the highway fund for State-aid roads, the remainder of which was used for regulation purposes; that the State collected $17,525,616.25 from gasoline tax; that for the same year the State of Georgia spent only $11,127,258.38 for highway construction, and of the sum expended the Federal Government contributed $3,721,489.90. Further, that only eleven per cent. of the entire mileage traveled by the defendant in fi. fa. is traveled within the boundaries of the State of Georgia, and the State collected far more than eleven per cent. of the total taxes paid by it to all of the other six States through which it operates; and that if it were required to pay the same amount of taxes in the other States, it would be unable to operate at a profit.

The Dixie-Ohio Express Company contends that the affidavit of illegality contained sufficient allegations to show that the levy of the fi. fa. was proceeding illegally, in that the tax sought to be collected was not due by the defendant in fi. fa., because the maintenance-tax act of 1937, under which the fi. fa. was issued, was void and unconstitutional; and therefore that the court erred in dismissing the affidavit. The legal questions presented are in the affidavit of illegality, and all the grounds of the affidavit are insisted on. These in summary are whether:

[fol. 50] (1) The maintenance-tax act of 1937, as applied to the plaintiff in error, is void in that it violates article 1, section 1, paragraphs 2 and 3, of the constitution of Georgia. (2) The tax is void in that it violates article 1, section 8, paragraph 3, of the Constitution of the United States. (3) The tax is void in that it violates section 1 of the fourteenth amendment to the Constitution of the United States.

GRICE, Justice:

The affidavit of illegality attacks as unconstitutional the motor-bus maintenance-tax act approved March 30, 1937 (Ga. Laws 1937, pp. 155-167). The act in question, by section 1, provides that "all persons, firms, corporations, or associations holding title to a motor-bus, truck and/or trailer, or having exclusive right to the use thereof for a

period of more than thirty days, shall pay a maintenance tax for the operation of such motor-bus, truck, and/or trailer upon and over the public roads of this State, according to the schedule" provided by the terms of the act. The maintenance tax is to be levied in addition to any and all other taxes, licenses, or registration fees required under existing laws. The terms of the act definitely identify the license or fee prescribed as a charge for the privilege of using the highways of the State. The entire amount of the tax collected under the provisions of the act is allocated for the construction and maintenance of public highways, to-wit, post roads. No provision is made to deduct any part thereof for the expense of collection or for any regulatory purpose. By section 2 of the act are given certain definitions of the scope of the act's operation, and in section 3 the schedule of license fees to be exacted is set out. There are three [fol. 51] classifications provided by this section: one is the license fee for the operation of passenger-carrying motor buses; another is the fee applicable to and exacted from persons operating non-passenger-carrying motor vehicles or trucks not used as common or contract carriers for hire; the third schedule applies to non-passenger-carrying motor vehicles or trucks used as common or contract carriers for hire. The license fees prescribed are different under each of these classifications. There is also a classification applying to trailers or semi-trailers, and in each main classification above referred to the trucks or buses are classified according to weight or manufacturer's rated capacity and the tax fixed according to a graduated scale; that is to say, the larger or heavier or the greater the rated carrying capacity of the t k or bus, the larger the amount of tax exacted. The st ate does not undertake to make any difference or distinction between the fees or charges applicable to persons operating interstate from those applicable to persons operating intrastate. The fee is the same without reference to whether the operations are interstate or intrastate.

1. The first insistence of the plaintiff in error is that the General Assembly could not, consistently with constitutional provision, provide for one class of carriers for hire, and another class of carriers not for hire, and charge different amounts for the two classes; and that accordingly the act discriminates against Dixie-Ohio Express Company, a common carrier of property for hire, in favor of private car-

riers of property. A State through its General Assembly may make classifications of subjects for taxation. The only constitutional requirement is that in so doing the classification so made shall have some rational basis. In Wright v. [fol. 52] Hirsch, 155 Ga. 227, 236 (116 S. E. 795), this court discussed very fully this question, and, speaking through Mr. Justice Hines, said: "The power of the legislature to classify persons for the purpose of imposing occupation taxes is undisputed. The provisions of the constitution with which we are dealing clearly recognize this power of classification. The power to classify necessarily includes the power to sub-classify. The legislature does not exhaust its power in this matter when it puts dealers of a particular kind in one class. It can place grocers in a class by themselves. It can put cigar dealers in a class by themselves. It can do the same thing with any other class of merchants. It can then sub-divide these classes into wholesale and retail dealers, and put a higher tax upon the former than upon the latter. Cook v. Marshall County, 196 U. S. 261 (25 Sup. Ct. 233, 49 L. ed. 471). In framing tax acts it has long been the custom of the legislature to divide merchants into wholesale and retail, and to place a higher occupation tax upon the former than upon the latter. This power of subclassification has been expressly declared to exist, by this court." On the question as to the scope of the power of a legislature to make classifications of businesses or subjects as a basis for a difference in treatment for tax purposes, see also: Johnston v. Macon, 62 Ga. 645; Davis v. Macon, 64 Ga. 128 (37 Am. R. 60); Goodwin v. Savannah, 53 Ga. 410; Singer Mfg. Co. v. Wright, 97 Ga. 114, 118 (25 S. E. 249, 35 L. R. A. 497); Sawtell v. Atlanta, 138 Ga. 687 (75 S. E. 982); Hazleton v. Atlanta, 144 Ga. 775 (87 S. E. 1043); Price v. Richardson, 159 Ga. 299 (125 S. E. 449); Hunter v. Wright, 169 Ga. 840 (152 S. E. 61); Adams Motor Co. v. Cler, 149 Ga. 818 (102 S. E. 440); Featherstone v. Norman, 170 Ga. 370, 386 (153 S. E. 58, 79 A. L. R. 449); Southern Transfer Co. v. Harrison, 171 Ga. 358 (155 S. E. 338); Hoffman v. Harrison, 171 Ga. 792 (156 S. E. 685); [fol. 53] Guerry v. Harrison, 178 Ga. 669; Milliron v. Harrison, 175 Ga. 764 (166 S. E. 231, 84 A. L. R. 1142); Coy v. Linder, 183 Ga. 583 (189 S. E. 26).

In the recent case of Carmichael v. Southern Coal &c. Co., 301 U. S. 495-531 (57 Sup. Ct. 868, 81 L. ed. 1245), the Supreme Court of the United States discussed at length

the power of a State or legislative body to make classifications of property for purposes of taxation. Involved in that case was the question of the constitutionality of the unemployment-insurance compensation act of Alabama; and it was contended that the act in question consfituted an infringement of the due-process and equal-protection clauses, on the ground that there were exempted from the provisions of the act agricultural laborers, domestic servants, employees of charitable institutions and interstate railways, etc. In other words, the basis of the constitutional attack was an alleged discrimination. Answering the contention made, the court, through Mr. Justice Stone, said: "It is inherent in the exercise of the power to tax that a State be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal-protection imposes upon a State any rigid rule of equality of taxation [citing cases]. This court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation [citing cases]. Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts that would support it." (Citing cases.) The court further said: "This restriction upon the judicial function, in passing on the con- [fol. 54] stitutionality of a statute, is not artificial or irrational. A State legislature, in the enactment of laws, has the widest possible latitude within the limitations of the constitution. In the nature of the case it can not record a complete catalog of the considerations which move its members to enact laws. In the absence of such a record courts can not assume that its action is capricious, or that, with its informed acquaintance with the local condition, to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

For other rulings on this same general subject by the Supreme Court of the United States, see Carley v. Snook,

281 U. S. 66 (50 Sup. Ct. 204, 74 L. ed. 705); Aero Mayflower Transit Co. v. Georgia Public-Service Commission, 295 U. S. 285 (55 Sup. Ct. 709, 79 L. ed. 1439); Continental Baking Co. v. Woodring, 286 U. S. 352 (52 Sup. Ct. 595, 76 L. ed. 1155); Clark v. Poor, 274 U. S. 554 (47 Sup. Ct. 702, 71 L. ed. 1199); Morf. v. Bingham, 298 U. S. 407, 412 (56 Sup. Ct. 756, 80 L. ed. 1245). We think that the General Assembly can, for the purpose of taxation of this character, make classifications of carriers by truck, and make as one class those operating for hire either as contract or common carriers and the other as carriers not for hire. A rational basis for such classification readily appears. The carrier not for hire transports over the highways his own goods or property. He uses the highways only as the circumstances and exigencies of his own business require. His use of the highways is incidental only, while the carrier for hire operates over the highways transporting property of others, and charges compensation therefor. He makes the highways his place of business, and the natural tend- [fol. 55] ency will of course be for him to use the highways more, truck for truck, than does the carrier not for hire. In many cases courts of last resort have held that the classification is justified; that the lawmaking body may tax the common carrier for hire using the highways and exempt altogether the carrier not for hire. Like classifications for similar purposes have been upheld by the courts generally. In Bekins Van Lines v. Riley, 280 U. S. 80 (50 Sup. Ct. 64, 74 L. ed. 178), the Supreme Court of the United States was asked to strike down an amendment to the constitution of California, and statutes of that State laying upon common carriers engaged in transporting freight by motor vehicles for hire along public highways between fixed termini and over regular routes in California a tax upon their gross receipts, while other carriers were subjected to different and less burdensome taxation. The court held that there was no violation of the equal-protection clause, "since it cannot be said that the classification lacks any reasonable basis." In the opinion it was said: "Appellants voluntarily assumed the position of common carriers operating between fixed termini and enjoy all consequent benefits. That a marked distinction exists between common and private carriers by auto vehicles appears from Frost v. Railroad Commission, 271 U. S. 583 (46 Sup. Ct. 605, 70 L. ed.

1101), and Michigan Public Utilities Commission v. Duke, 266 U. S. 570 (45 Sup. Ct. 191, 69 L. ed. 445, 36 A. L. R. 1105). Sufficient reasons for placing common carriers, operating as appellants do, in a special class are pointed out by Raymond v. Holm, 165 Minn. 215 (206 N. W. 166); State v. LeFebvre, 174 Minn. 248 (219 N. W. 167); Iowa Motor Vehicle Asso. v. Railroad Com., 207 Iowa 461 (221 N. W. 364); Liberty Highway Co. v. Michigan Public Utilities Commission, 294 Fed. 703. Their use of the highways [fol. 56] probably will be regular and frequent, and therefore unusually destructive thereto. Also it will expose the public to dangers exceeding those consequent upon the occasional movements of other carriers." See also the annotations appended to the report of the case of Public-Service Commission of Wyoming v. Grimshaw, in 109 A. L. R. 534, 566 (49 Wyo. 158, 53 Pac. (2d) 1).

2. The maintenance-tax act is also criticized by plaintiff in error in that in each main classification, that is to say, the carriers for hire and the carriers not for hire, there is set up a subsclassification based on the manufacturer's rated capacity of the vehicles used, and fixing a different rate of tax according to the manufacturer's rated capacity, and that there is no relationship between the manufacturer's rated capacity of a truck or motor vehicle and its weight, and consequently no reasonable relationship between the manufacturer's rated capacity and the wear and tear that such vehicle will cause to the highways by its use. The affidavit of illegality recites that "Rated capacity denotes the power of the motor, and not the weight or carrying capacity of the body of the truck." Even so, it would seem that the manufacturer's rated capacity of a motor vehicle has a direct and natural relation to the propensities of the vehicle to injure the highway, and to create public hazards. To make a classification based on the horse-power of the motor is not an arbitrary classification. It was expressly so decided in Lee v. State, 163 Ga. 239, 242 (139 S. E. 912), in Hendrick v. Maryland, 235 U. S. 610 (35 Sup. Ct. 140, 59 L. ed. 385), and in Kane v. New Jersey, 242 U. S. 160, 167 (37 Sup. Ct. 30, 61 L. ed. 222). See also Hicklin v. Coney, 290 U. S. 169 (54 Sup. Ct. 142, 78 L. ed. 247); Carley v. Snook, supra.

[fol. 57] 3. Still another ground of attack is that the tax collected is not used on the highways over which the plaintiff

in error operates its trucks, but under the terms of the act it is allocated to rural post roads; that it is impossible for it to use the rural post roads of Georgia, because its routes within this State have been limited by the certificate granted it by the Interstate-Commerce Commission pursuant to the Federal motor-carrier act of 1935. U. S. C. A. title 49, §§ 301, 306. However, the privilege granted the carrier by the maintenance-tax act of 1937 here under attack is unlimited. Under it, the carrier, provided it complies with other requirements of law as to license fee, etc., may use every road in the system, including those to the maintenance of which the tax here challenged is allocated, to wit, those roads, to use the words of the statute, in the "United States rural post-roads division of the State highway of Georgia." In Aero Mayflower Transit Co. v. Georgia Public Service Commission, supra, it was said: "One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." The decision in Clark v. Poor, supra, dealt with an Ohio statute, and is in point here. It was there held: "A State regulation providing that, before operating over the State highways, a common carrier by motor shall apply for and obtain a certificate or permit therefor from a State commission, and shall pay an extra tax for the maintenance and repair of the highways and for the administration and enforcement of the laws governing their use, is constitutional though applied to carriers engaged exclusively in interstate commerce. • • • That the tax so exacted is not all used for maintenance and repair of the highways, but some of it for defraying expenses of the commission in administration and enforcement of the [fol. 58] act, and some for other purposes, is no concern of the taxpayer, it being assessed for a proper purpose and not unreasonable in amount." In the opinion it was said: "The plaintiffs claim, as applied to them, the act violates the commerce clause of the Federal constitution. They insist, that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the State; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, under § 614-94, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the

same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the State to insure safety and convenience and the conservation of the highways [citing Morris v. Duby, 274 U. S. 135 (47 Sup. Ct. 548, 71 L. ed. 966); Hess v. Pawloski, 274 U. S. 352 (47 Sup. Ct. 632, 71 L. ed. 1091)]. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use [citing Hendrick v. Maryland, Kane v. New Jersey, supra]. Compare Packard v. Banton, 264 U. S. 140, 144," (44 Sup. Ct. 257, 68 L. ed. 596). One of the grounds of attack in the case just referred to, it is to be noted, was that not all of the tax was used for the maintenance and repair of the highways; that some of it was used for defraying the expense of the commission in the administration and enforcement of the act, and some for other purposes. The court said: "Since [fol. 59] the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

The plaintiff in error relies on Interstate Transit Inc. v. Lindsey, 283 U. S. 183 (51 Sup. Ct. 380, 75 L. ed. 953); but it was distinctly ruled in that case that "A detailed examination of the statute under which the tax here challenged was laid makes it clear that the charge was imposed, not as a compensation for the use of the highways, but for the privilege of doing the interstate bus business." In the opinion it was said: "While a State may not lay a tax on the privilege of engaging in interstate commerce (Sprout v. South Bend, 277 U. S. 163 (48 Sup. Ct. 502, 72 L. ed. 833), it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and regulating the traffic thereon [citing Kane v. New Jersey, Clark v. Poor, Sprout v. South Bend, supra]. As such a charge is a direct burden on interstate commerce, the tax can not be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expenses of regulating motor traffic. This may be indicated by the nature of the imposi-

tion, such as a mileage tax directly proportioned to the use (Interstate Busses Corp. v. Blodgett, 276 U. S. 245 [48 Sup. Ct. 230, 72 L. ed. 551]), or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, supra, or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick v. Maryland [fol. 60] [supra]; Interstate Busses Corp. v. Holyoke Street Ry., 273 U. S. 45, 51 [47 Sup. Ct. 298, 71 L. ed. 530]." See also Aero Mayflower Transit Co. v. Georgia Public Service Com., 179 Ga. 431 (176 S. E. 487), s. c. 295 U. S. 185, supra.

4. It follows that the maintenance-tax act approved March 30, 1937 (Ga. L. 1937, p. 155), is not violative of article 1, section 1, paragraphs 2 and 3, of the constitution of this State, which declare that "Protection to person and property is the paramount duty of government, and shall be impartial and complete," and "No person shall be deprived of life, liberty, or property, except by due process of law;" or of article 1, section 8, paragraph 3 of the constitution of the United States, which provides that "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes;" or of the due-process clause of the 14th amendment of the constitution of the United States, which declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Judgment affirmed. All the Justices concur.

[fols. 61-64] IN SUPREME COURT OF GEORGIA

12230

DIXIE-OHIO EXPRESS CO.

v.

STATE REVENUE COMMISSION et al.

JUDGMENT—June 17, 1938

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

[fol. 65] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed July 20, 1938

The petitioner, Dixie Ohio Express Company, assigns the following errors in the record and proceedings in this cause:

1

The Supreme Court of the State of Georgia erred in not holding the statute involved herein unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that the appellant herein is a non-resident of Georgia, operating motor vehicles as a common carrier for hire exclusively in interstate commerce over the State highways of Georgia and the statute involved levies a tax on the appellant, the proceeds of which are used entirely for the maintenance of post roads which appellant does not and cannot use.

2

The Supreme Court of Georgia erred in not holding the statute involved herein unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that the statute involved levied a tax for the purpose of maintaining certain high-

ways and the amount of the tax was graduated according to the manufacturer's rated capacity of trucks and the [fol. 66] tory weight of trailers, and was made applicable to the appellant, a common carrier for hire operating both types of vehicle exclusively in interstate commerce.

3

The Supreme Court of Georgia erred in not holding the statute involved herein unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that exclusive of the maintenance tax involved herein that the appellant, a common carrier for hire engaged exclusively in interstate commerce, has paid two other license fees for all vehicles, operated in the State of Georgia and in addition has paid gasoline taxes, the combined total of which was more than sufficient to pay its proportionate share of the expenses of motor vehicle regulation and for its use of the highways.

4

The Supreme Court of Georgia erred in not holding the statute herein involved unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that the statute required a much higher tax on vehicles of the appellant, who operated as a common carrier for hire exclusively in interstate commerce, than was required of identical vehicles not operated for hire, even though there are more than twenty times as many carriers operating not for hire as there are carriers operating for hire on the highways of the State of Georgia. In addition, the facts show that appellant is required to pay other fees that are not exacted of carriers operating for hire.

5

The Supreme Court of Georgia erred in not holding the statute herein involved unconstitutional as being repugnant to the equal protection clause of the fourteenth amendment to the Constitution of the United States, the facts [fol. 67] showing that the statute required a much higher tax on vehicles of the appellant, who operated as a common carrier for hire exclusively in interstate commerce, than was required of identical vehicles not operated for hire, even though there are more than twenty times as many car-

riers operating not for hire as there are carriers operating for hire on the highways of the State of Georgia. In addition, the facts show that appellant is required to pay other fees that are not exacted of carriers operating not for hire.

Wherefore, on account of the errors hereinbefore assigned, petitioner prays that said judgment of the Supreme Court of the State of Georgia, dated the 17th day of June, 1938, in the above entitled cause, be reversed and judgment entered in favor of this appellant.

This 19th day of July, 1938.

Edgar Watkins, Allan Watkins, Attorneys for the Appellant.

Post Office Address: 1025 Citizens & Southern National Bank Building, Atlanta, Georgia.

[File endorsement omitted.]

[fol. 68] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 20, 1938

The appellant in the above entitled cause, having prayed for an allowance of an appeal in this cause to the Supreme Court of the United States and the judgment made and entered in the above entitled cause by the Supreme Court of the State of Georgia on the 17th day of June, 1938, and upon each and every part thereof and having presented and filed its petition for appeal, assignments of error and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided:

It is now ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the final judgment of the Supreme Court of Georgia dated the 17th day of June, 1938, as prayed in said petition and it is further ordered that the clerk of the Supreme Court of the State of Georgia shall, within forty (40) days from this date, make and transmit to the Supreme Court of the United States a true copy of the material parts of the record, which

shall be designated by praecipe or stipulation of the parties or their counsel herein.

It is further ordered that the said appellant shall give good and sufficient bond in the sum of fifty-six dollars and twenty-five — ($56.25) that said appellant shall prosecute [fols. 69-102] said appeal to effect and answer all costs if he fails to make his plea good and that said supersedeas bond, when filed and approved, shall stay sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

This 19th day of July, 1938.

Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fol. 103] In Supreme Court of the United States

Statement of the Points on Which Appellant Intends to Rely and Designation as to Printing Record—Filed August 8, 1938

Appellant in the above styled case intends to rely on the following points:

1. The statute attacked in this case is unconstitutional and void in that the same is repugnant to the commerce clause of the Constitution of the United States as the proceeds of the tax are used to maintain roads over which the appellant does not and can not use.

2. The statute attacked in this case is unconstitutional and void in that the same is repugnant to the commerce clause of the Constitution of the United States as the measure of the tax bears no reasonable relationship to the use made of the highways.

3. The statute attacked in this case is unconstitutional and void in that the same is repugnant to the commerce clause of the Constitution of the United States as the appellant herein has paid other motor vehicle fees, the total of which is sufficient to pay its share of the expenses of the motor vehicle regulation and for the use the appellant makes of the highways.

4. The statute attacked in this case is unconstitutional and void in that the same is repugnant to the commerce [fol. 104] clause of the Constitution of the United States in that the tax discriminates against carriers for hire in favor of carriers not for hire.

5. The statute attacked in this case is unconstitutional and void in that the same is repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that the tax discriminates against carriers for hire and in favor of carriers not for hire.

The above is a summary of the assignments of error and reference to that assignment is here made.

Parts of the Record on Which Appellant Intends to Rely

1. The execution issued by the State Revenue Commission.
2. Original affidavit of illegality filed by appellant in Fulton Superior Court and the amendment thereto.
3. The judgment of the Superior Court of Fulton County.
4. The opinion of the Supreme Court of the State of Georgia.
5. The statement as to jurisdiction, excepting the opinion of the Supreme Court of Georgia attached thereto.
6. The order allowing the appeal to the Supreme Court of the United States.
7. The assignments of error filed by the appellant in this Court.
8. This statement.

Respectfully submitted, Edgar Watkins, Allan Watkins, Attorneys for Appellant.

Post Office Address: 1025 Citizens & Southern National Bank Building, Atlanta, Georgia.

[fol. 105] Service of the foregoing Statement is hereby acknowledged, copy received and all other service waived.

This 4th day of August, 1938.

M. J. Yeomans, Attorney-General of the State of Georgia; W. H. Duckworth, O. H. Dukes, Assistant Attorney-General of the State of Georgia, Attorneys for Appellee.

[fol. 105½] [File endorsement omitted.]

[fol. 106] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD CONSIDERED MATERIAL BY APPELLEES—Filed August 10, 1938

Come now appellees within ten days after service of statement of points upon which appellant intends to rely and the parts of the record, deemed by it to be necessary for a consideration of the questions presented, and pursuant to paragraph 9 of rule 13, designate additional parts of the record in said case deemed by appellees to be material in consideration and determination of the question raised, to-wit:.

1. The original demurrer of the State Revenue Commission, et al., to the affidavit of illegality as filed by Dixie Ohio Express Company, appellant herein.

2. Second demurrer filed by State Revenue Commission, et al., after allowance of an amendment to the original affidavit of illegality as filed by Dixie Ohio Express Company and demurring to said affidavit of illegality as amended.

The parts and portions of the record designated in paragraphs 1 and 2 of this statement should be incorporated in the printed record.

Respectfully submitted, M. J. Yeomans, Attorney General of Georgia; W. H. Duckworth, Assistant Attorney General; O. H. Dukes, Assistant Attorney General, Attorneys for Appellees.

Post Office Address: 112 State Capitol, Atlanta, Ga.

[fol. 107] Service of the foregoing statement is hereby acknowledged, copy received and all other service waived.

This 8th day of August, A. D., 1938.

Edgar Watkins, Allan Watkins, Attorneys for Appellant.

[fol. 108] [File endorsement omitted.]

Endorsed on cover: File No. 42,745. Georgia Supreme Court. Term No. 260. Dixie Ohio Express Company, Appellant, vs. State Revenue Commission of Georgia et al. Filed August 8, 1938. Term No. 260, O. T., 1938.

FILE COPY

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FILED
AUG 8 1938
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 260

DIXIE OHIO EXPRESS COMPANY,
Appellant,

vs.

STATE REVENUE COMMISSION OF GEORGIA ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

STATEMENT AS TO JURISDICTION.

EDGAR WATKINS,
ALLAN WATKINS,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 260

DIXIE OHIO EXPRESS COMPANY,
Appellant,

vs.

STATE REVENUE COMMISSION OF GEORGIA ET AL.,
Appellees.

STATEMENT AS TO JURISDICTION.

Complying with Rule 12 of the revised rules of the Supreme Court of the United States, appellant shows:

The appellee, State Revenue Commission of Georgia, issued an execution against the appellant for a fee alleged to be due under the provisions of a statute of Georgia known as the Maintenance Tax Act (Printed Georgia Laws of 1937, page 155). A fi. fa. was levied on the property of the appellant and to the levy the appellant filed an affidavit of illegality which challenged the constitutionality of the Georgia Maintenance Tax Act upon the following grounds: (1) that the same constituted a burden on interstate commerce in violation of the commerce clause of the Federal Constitution; (2) that the statute constituted a prejudice and a discrimination against the appellant to the preference and advantage of appellant's competitors, and denied the appel-

lant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

The appellees filed a general demurrer to the affidavit of illegality, which was sustained by the trial court.

Upon writ of error to the Supreme Court of Georgia, the judgment of the trial court was affirmed, June 17, 1938, which held valid the Georgia Maintenance Tax Act.

Paragraph (a) of Section 237 of the Judicial Code, as amended (Title 28, Section 344, United States Code), gives jurisdiction to the Supreme Court of the United States on this appeal.

The date of the judgment here sought to be reviewed is June 17, 1938, and the date the application for appeal herein was presented for record July 19, 1938.

Cases showing that this case falls within the jurisdiction of this Court and that appeal lies are numerous. A leading and controlling case is that of *Smith* v. *Cahoon*, 283 U. S. 553.

The constitutional questions were raised in the trial court and were passed upon by the trial court and also the Supreme Court of Georgia. The only opinion rendered in the case was by the Supreme Court of Georgia, a copy of which is attached hereto.

Appellant has served upon appellees within five (5) days from the allowance of the petition a copy of the same and in addition an order allowing the appeal, together with a copy of the assignments of error and of this statement and this statement hereby specifically directs the attention of the appellees to paragraph 3, Rule 12 of the rules of the Supreme Court of the United States.

The statute of the State of Georgia, the validity of which is involved herein, is copied in the printed Georgia Laws of 1937 beginning at page 155 and a summary of the pertinent provisions of such statute is set out as follows:

The title of the act states, among other things, "An act to provide for the levy of a tax to be known as a Maintenance

Tax to be paid by owners of motor buses, trucks, and/or trailers operating over the public roads of this state."

Section 1 of the act reads in part (p. 156), "All persons, firms, corporations, or associations holding title to a motor bus, truck and/or trailer or having exclusive right to the use thereof for a period of more than thirty (30) days, shall pay a maintenance tax for the operation of such motor bus, truck, and/or trailer upon and over the public roads of this state, according to the schedule hereinafter provided. The maintenance tax herein provided for shall be in addition to any and all other taxes, licenses, or registration fees now required under existing laws."

Section 2 of the act, page 157 thereof, defines the terms used therein, including trucks and trailers.

Section 3B, page 158, contains the schedule pertinent to the issues in this case. "For each non-passenger carrying motor vehicle or truck not used as a common or contract carrier for hire, the following sums, to wit:

"1. For each non-passenger carrying motor vehicle or truck of less than one ton manufacturer's rated capacity..... $5.00

"2. For each non-passenger carrying motor vehicle or truck of one ton manufacturer's rated capacity..... 10.00

"3. For each non-passenger carrying motor vehicle or truck of more than one ton and not exceeding one and one-half tons manufacturer's rated capacity... 15.00

"4. For each non-passenger carrying motor vehicle or truck of more than one and one-half and not exceeding two tons manufacturer's rated capacity..... 30.00"

The schedule continues to increase in ratio to increase of manufacturer's rated capacity up to seven tons, for which

the fee is $1,125.00, but the higher brackets are not in issue here.

Section 3C, pages 159-160, provides: "For each non-passenger carrying motor vehicle or truck used either as a common or contract carrier for hire, the following sums, to wit:

"1. For each non-passenger carrying motor vehicle or truck of less than one ton manufacturer's rated capacity	$10.00
"2. For each non-passenger carrying motor vehicle or truck of one ton manufacturer's rated capacity	20.00
"3. For each non-passenger carrying motor vehicle or truck of more than one ton and not exceeding one and one-half tons manufacturer's rated capacity	50.00
"4. For each non-passenger carrying motor vehicle or truck of more than one and one-half and not exceeding two tons manufacturer's rated capacity	75.00"

The higher brackets are not included herein.

Section 3D, page 161, provides: "For each trailer or semi-trailer not used as, or in connection with a non-passenger carrying motor vehicle or truck used as a common or contract carrier for hire the following sums, to wit:

"1. For each trailer or semi-trailer not exceeding 1,000 pounds factory weight	$5.00
"2. For each trailer or semi-trailer exceeding 1,000 pounds but not more than 2,000 pounds factory weight	10.00
"3. For each trailer or semi-trailer exceeding 2,000 pounds but not more than 3,000 pounds factory weight	20.00
"4. For each trailer or semi-trailer exceeding 3,000 pounds but not more than 4,000 pounds factory weight	30.00

"5. For each trailer or semi-trailer exceeding 4,000 pounds but not more than 5,000 pounds factory weight 40.00

"6. For each trailer or semi-trailer exceeding 5,000 pounds but not exceeding 6,000 pounds factory weight ..... 50.00"

The higher brackets are not included herein.

Section 3E, page 162, provides: "For each trailer or semi-trailer used as, or in connection with, a non-passenger carrying motor vehicle or truck used as common or contract carrier for hire, the following sums, to wit:

"1. For each trailer or semi-trailer not exceeding 1,000 pounds factory weight ... $10.00

"2. For each trailer or semi-trailer exceeding 1,000 pounds but not more than 1,500 pounds factory weight 20.00

"3. For each trailer or semi-trailer exceeding 1,500 pounds but not more than 3,000 pounds factory weight 30.00

"4. For each trailer or semi-trailer exceeding 3,000 pounds but not more than 4,000 pounds factory weight 50.00

"5. For each trailer or semi-trailer exceeding 4,000 pounds but not more than 5,000 pounds factory weight 75.00

"6. For each trailer or semi-trailer exceeding 5,000 pounds but not exceeding 6,000 pounds factory weight ..... 100.00"

The higher brackets are not included herein.

Section 4 of the Act, page 163, provides that the tax shall be due and payable April 1, 1937, but that only three-fourths of the amount provided for in the act shall be payable for the year 1937.

Section 7, page 164, provides for a twenty per cent penalty in the event that the tax is not paid within thirty days after it is due.

Section 8, pages 164-5, provides that beginning January 1, 1938, all persons shall pay the full amount of the tax, as set out in the act.

Section 9, page 165, provides for the issuance of tags on paying the tax.

Section 10, page 165, provides "That all persons, firms, corporations or associations, whether resident or nonresident of this State making or causing to be made by or through any of their agents, servants, or employees more than two (2) trips per month into this State with any of the vehicles herein named shall be liable to and shall pay the tax herein provided for except that any of the named vehicles named herein shall be allowed a maximum of ten (10) trips per month into this State for the purpose of hauling seasonable agricultural products grown in this State without payment of the tax herein provided for."

Section 11, page 166, provides "That any and all moneys derived from the sale of maintenance tags shall be and the same are hereby allocated to the United States Rural Post Roads division of the State Highway Department of Georgia, to be expended through the director thereof, and the said moneys shall be prorated among the several counties of this state according to the number of miles of rural post roads in said counties."

Section 11-A, page 166, repeals the existing Georgia Mileage Tax Act.

The affidavit of illegality alleged that the Georgia Maintenance Tax Act, construed with other related motor vehicle acts, was unconstitutional as applied to appellant.

The other related acts will not be copied in full, but the pertinent provisions thereof are as follows:

Under the Motor Fuel Tax Law, Georgia Laws of 1937, beginning at page 167, Section 92-1403 of the Georgia Code of 1933, is amended to read as follows (page 174), "An excise tax is hereby imposed on all distributors of motor fuel and/or kerosene: (A) upon the sale or use of motor fuel by them within this State, at the rate of six ($0.06) cents per gallon."

Section 92-1404 of the 1933 Code is amended by the Motor Fuel Tax Law, page 180 of the Georgia Laws of 1937, "(A) The proceeds of the six ($0.06) cents per gallon tax on motor fuel shall be paid to the State Treasurer and by him distributed as follows: An amount equal to (1) four ($0.04) cents per gallon shall be set aside to the State Highway Fund, for use in construction on the State Highway System of Roads, or State Aid System of Roads; and (2) one ($0.01) cent per gallon shall be set aside to be distributed to the several counties of the State to be used exclusively for the construction and maintenance of public roads; and (3) one ($0.01) cent per gallon shall be set aside to the public schools of this State for an equalization fund."

The Georgia Legislature in 1937 passed an act creating United States Post Roads Division (Georgia Laws, 1937, page 912). The title of the act, as stated at page 912, is "An act to define United States Post Roads * * * and to provide for the construction and maintenance of farm to market roads * * * to create a system of United States Rural Post Roads in the State of Georgia." Section 6 of this Act (Georgia Laws, 1937, page 914) defines rural post roads as follows: "The term 'Rural Post Roads' shall mean all roads and highways in the several counties of the State of Georgia over which U. S. mail is carried, not included in the present highway system. The term 'Farm-to-Market Roads' in this Act shall mean all public roads and highways in the several counties of the State of Georgia, other than U. S. Post Roads and/or State-Aid Roads."

Section 95-1701 of the 1933 Georgia Code provides for a system of State Aid roads maintained by the state through the State highway department.

Section 68-211 of the 1933 Code, as amended by the act of 1935, page 157, provides that the annual fee for licensing of the operations of vehicles shall be $3.00 for each such vehicle registered.

Under Section 95-1703 of the 1933 Georgia Code, the funds derived from the sale of these $3.00 license fees are placed in the State Treasury, to be used by the Highway Department for the purpose of constructing and maintaining the State Highway System and State Aid Roads after the expenses of the Revenue Commission have been first deducted.

Section 68-601 through Section 68-634 provide for the regulation of motor common carriers within the State of Georgia.

Section 68-623 of the 1933 Code provides that every motor common carrier "shall annually on or before January first, as long as such certificate remains in force, or before the vehicle is put into use, as to a vehicle put into use during the course of the year, make application to the Commission for registration of all motor vehicles to be operated under said certificate in manner and form as the Commission may by rule or regulation prescribe, and shall pay to the Commission a fee of $25.00 for each vehicle for the registration of the same and the issuance of a permit or license to operate the same. * * * The money derived from the issuance and transfer of certificates and from the registration fee shall be subject to be used by the Commission for the administration and enforcement of this law, and any sum which may be left over and unexpended on the first day of January of each year shall be paid to the State Treasurer and shall be disbursed by him and paid to the State Highway Board for use in maintenance and repair of the high-

ways as in the discretion of the Highway Board may be directed."

Section 68-601 (e) of the 1933 Code defines motor common carrier as used in this Chapter of the Code as persons using motor propelled vehicles for the transportation of persons or property for hire on the public highways of this state. The legislature of Georgia passed an act in 1937 creating a department of public safety (Ga. Laws, 1937, p. 332). Under Section 6, page 346, a person operating a vehicle for hire must purchase a $2.00 chauffeur's license. Persons not operating a for hire vehicle are required to pay only $1.00, Section 8, page 347.

WHEREFORE it is respectfully submitted that jurisdiction of this Court lies and that this appeal is the proper way of invoking the jurisdiction of this Court.

This 19th day of July, 1938.

EDGAR WATKINS,
ALLAN WATKINS,
Attorneys for the Appellant.

Post Office Address: 1025 Citizens & Southern, National Bank Building, Atlanta, Georgia.

EXHIBIT "A".

Opinion of the Supreme Court of Georgia.

June 17, 1938.

12230.

DIXIE OHIO EXPRESS COMPANY

v.

STATE REVENUE COMMISSION ET AL.

1. The maintenance tax act of 1937 (Ga. L. 1937, pp. 155-167) is not void on the ground that it violates the equal protection clause, or the due-process clause as embodied in article I, section 1, paragraphs 2, 3, of the constitution of this State. Code §§ 2-102, 2-103.

2. Neither is said act violative of the commerce clause as embodied in article I, section 8, paragraph 3, of the constitution of the United States. Code Section 1-125.

3. Nor is said act violative of section 1 of the fourteenth amendment of the constitution of the United States, inhibiting the passage of laws abridging the privileges or immunities of citizens. Code § 1-815.

Affidavit of illegality of execution. Before Judge Moore. Fulton Superior Court. Dec. 2, 1937.

The state revenue commission of Georgia issued a fi. fa. against Dixie Ohio Express Company, and caused the same to be levied by a sheriff of Fulton County on property of the company. The fi. fa. was issued for the amount of a license fee or a maintenance tax alleged to be due by the Dixie Ohio Express Company, under the maintenance tax act of 1937, for a truck operated by that company over certain highways of Georgia. After levy the defendant in fi. fa. filed with the sheriff an affidavit of illegality, and gave bond for the eventual condemnation-money. A general demurrer to this affidavit was filed by the State Revenue Commission, and after hearing the court sustained the demurrer and dismissed the affidavit. To this ruling the defendant excepted.

The affidavit of illegality alleges that the levy is proceeding illegally against the defendant in fi. fa. because the 1937 maintenance tax act which authorized the tax is unconstitutional, in that it violates the provisions of both the state and federal constitutions.

Briefly stated, the affidavit contains the following allegations: The Express Company is an Ohio corporation with its principal office and place of business in that state. It is engaged in the business of transporting property by motor vehicle as a common carrier for hire between the States of Ohio, Pennsylvania, New York, Kentucky, Tennessee, Alabama and Georgia. It is engaged entirely in interstate commerce, and does no intrastate commerce whatever. It hauled commodities generally from places and points in Ohio to places in Georgia, and picked up freight in Georgia destined for the States north of Georgia. In operating over the highways of Georgia its trucks did not travel over any of the rural post roads of Georgia, as defined in the act of March 18, 1937, with respect to rural post roads; its trucks operated only over state aid highways, mostly from Tennessee-Alabama line near Chattanooga to Atlanta; a permit issued to it by the Interstate Commerce Commission limited its operations over these highways; and under the federal motor carrier act of 1935 it could not operate over the rural post roads of Georgia. It owned approximately one hundred pieces of equipment, consisting of one and one-half-ton and two-ton straight trucks, and one and one-half-ton and two-ton tractors which were used to pull trailers weighing approximately four thousand pounds; it purchased a $3 license tag for each truck, and a $25 Georgia public service tag for each truck, and purchased for each of its drivers a $2 chauffeur's license; and in addition to these taxes, it paid a tax of six cents per gallon for each gallon of gas purchased in the state of Georgia, and its purchases amounted to approximately 90,000 gallons of gas per year. The maintenance tax act provides a tax of $50 on trucks of a manufacturer's rated capacity of one and one-half tons, $75 for a manufacturer's rated capacity of two-tons in the event that the trucks are operated as carriers for hire; and in the event that they are operated as carriers not for hire,

the corresponding fees would be $15 for a truck of a rated capacity of one and one-half-tons and $30 for a truck of a rated capacity of two-tons.

It was further alleged that trailers are required to pay a fee graduated according to their empty factory weight, as set out in the maintenance tax act of 1937; that the manufacturer's rated capacity and empty factory weight had no relationship to the actual weight of the vehicle and no relation with respect to the use such vehicle would make of the highways of Georgia, because a truck of a rated capacity of one ton may weigh far in excess of a truck of a rated capacity of two or three tons, for rated capacity differs greatly from loaded capacity; that a combination of a tractor and trailer would pay a far greater fee than would a straight truck of approximately the same weight, even though the truck and trailer unit would cause less wear and tear on the highways than would the straight truck with a concentration of weight; that there was no relationship between the use made of the highway by these trucks and the tax levied, because there was a discrimination against carriers for hire in favor of carriers not for hire, for the fees of the latter are much less than the fees required of the former; that there were 69,503 carriers operating over the highways of Georgia as carriers not for hire, and only 2,943 trucks operated as carriers for hire; that the taxes already paid by the motor vehicle industry more than paid the cost of maintaining and constructing the highways of the State over which the defendant in fi. fa. operates; that the state collected $1,305,999.71 from the sale of the $3 tags, of which $1,209,495.05 was allocated to the state highway fund for state aid roads, and the remainder was used for regulation purposes; that the Georgia Public Service Commission collected $73,565.00 for registration fees, of which $28,341.12 was paid to the highway fund for state aid roads, the remainder of which was used for regulation purposes; that the State collected $17,525,616.25 from gasoline taxes; that for the same year the State of Georgia spent only $11,127,258.38 for highway construction, and of the sum expended the Federal government contributed $3,721,489.90. Further, that only eleven per cent of the entire mileage traveled by the de-

fendant in fi. fa. is traveled within the boundaries of the State of Georgia, and the State collected far more than eleven per cent of the total taxes paid by it to all of the other six states through which it operates; and that if it were required to pay the same amount of taxes in the other states, it would be unable to operate at a profit.

The Dixie Ohio Express Company contends that the affidavit of illegality contained sufficient allegations to show that the levy of the fi. fa. was proceeding illegally, in that the tax sought to be collected was not due by the defendant in fi. fa., because the maintenance tax act of 1937, under which the fi. fa. was issued, was void and unconstitutional; and therefore that the court erred in dismissing the affidavit. The legal questions presented are in the affidavit if illegality, and all the grounds of the affidavit are insisted on. These in summary are whether: (1) the maintenance tax act of 1937, as applied to the plaintiff in error, is void in that it violates article 1, section 1, paragraphs 2 and 3 of the constitution of Georgia; (2) the tax is void in that it violates article 1, section 8, paragraph 3, of the constitution of the United States; (3) the tax is void in that it violates section 1 of the fourteenth amendment to the Constitution of the United States.

Watkins, Grant & Watkins, Allan Watkins, for plaintiff in error. M. J. Yeomans, Attorney General, Dave M. Parker, O. H. Dukes, W. H. Duckworth, contra.

GRICE, *Justice:*

The affidavit of illegality attacks as unconstitutional the motor bus maintenance tax act approved March 30, 1937 (Georgia Laws, 1937, pp. 155-167). The act in question, by section 1, provides "that all persons, firms, corporations or associations holding title to a motor bus, truck and/or trailer, or having exclusive right to the use thereof for a period of more than thirty days shall pay a maintenance tax for the operation of such motor bus, truck and/or trailer upon and over the public roads of this State according to the schedule" provided by the terms of the act. The maintenance tax is to be levied in addition to any and all other taxes, licenses, or registration fees required under existing

laws. The terms of the act definitely identify the license or fee prescribed as a charge for the privilege of using the highways of the State. The entire amount of the tax collected under the provisions of the act is allocated for the construction and maintenance of public highways, to-wit, post roads. No provision is made to deduct any part thereof for the expense of collection or for any regulatory purpose. By section 2 of the act are given certain definitions of the scope of the act's operation, and in section 3 the schedule of license fees to be exacted is set out. There are three classifications provided by this section: one is the license fee for the operation of passenger-carrying motor buses; another is the fee applicable to and exacted from persons operating non-passenger-carrying motor vehicles or trucks not used as common or contract carriers for hire; the third schedule applies to non-passenger-carrying motor vehicles or trucks used as common or contract carriers for hire. The license fees prescribed are different under each of these classifications. There is also a classification applying to trailers or semi-trailers, and in each main classification above referred to the trucks or buses are classified according to weight or manufacturer's rated capacity and the tax fixed according to a graduated scale; that is to say, the larger or heavier or the greater the rated carrying capacity of the truck or bus, the larger the amount of tax exacted. The statute does not undertake to make any difference or distinction between the fees or charges applicable to persons operating interstate from those applicable to persons operating intrastate. The fee is the same without reference to whether the operations are interstate or intrastate.

1. The first insistence of the plaintiff in error is that the General Assembly could not, consistently with constitutional provision, provide for one class of carriers for hire, and another class of carriers not for hire, and charge different amounts for the two classes; and that accordingly the act discriminates against Dixie Ohio Express Company, a common carrier of property for hire, in favor of private carriers of property. A State through its General Assembly may make classifications of subjects for taxation. The only constitutional requirement is that in so doing the classification so made shall have some rational basis. In

Wright v. *Hirsch*, 155 Ga. 229, 236, 116 S. E. 795, this court discussed very fully this question, and, speaking through Mr. Justice Hines, said: "The power of the legislature to classify persons for the purpose of imposing occupation taxes is undisputed. The provisions of the constitution with which we are dealing clearly recognize this power of classification. The power to classify necessarily includes the power to sub-classify. The legislature does not exhaust its power in this matter when it puts dealers of a particular kind in one class. It can place grocers in a class by themselves. It can put cigar dealers in a class by themselves. It can do the same thing with any other class of merchants. It can then sub-divide these classes into wholesale and retail dealers, and put a higher tax upon the former than upon the latter. *Cook* v. *Marshall County*, 196 U. S. 261, 255 S. C. 233, 49 L. Ed. 471. • • • In framing tax acts it has long been the custom of the legislature to divide merchants into wholesale and retail, and to place a higher occupation tax upon the former than upon the latter. This power of sub-classification has been expressly declared to exist, by this court." On the question as to the scope of the power of a legislature to make classifications of businesses or subjects as a basis for a difference in treatment for tax purposes, see also: *Johnston* v. *Macon*, 62 Ga. 645, 646; *Davis* v. *Macon*, 64 Ga. 128, 37 Am. S. T. 60; *Goodwin* v. *Savannah*, 53 Ga. 410; *Singer Mfg. Co.* v. *Wright*, 97 Ga. 114, 118, 25 S. E. 249, 35 L. R. A. 497; *Sawtell* v. *Atlanta*, 138 Ga. 687, 75 S. E. 982; *Hazleton* v. *Atlanta*, 144 Ga. 775, 87 S. E. 1043; *Price* v. *Richardson*, 159 Ga. 299, 125 S. E. 449; *Hunter* v. *Wright*, 169 Ga. 840, 152 S. E. 61; *Adams Motor Co.* v. *Cler*, 149 Ga. 818, 102 S. E. 440; *Featherstone* v. *Norman*, 170 Ga. 370, 386, 153 S. E. 58, 79 A. L. R. 449; *Southern Tfr. Co.* v. *Harrison*, 171 Ga. 358, 155 S. E. 338; *Hoffman* v. *Harrison*, 171 Ga. 792, 156 S. E. 685; *Guerry v. Harrison*, 178 Ga. 669; *Millirons* v. *Harrison*, 175 Ga. 764, 166 S. E. 231, 84 A. L. R. 1142; *Coy* v. *Linder*, 183 Ga. 583, 189 S. E. 26.

In the recent case of *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495-531 (57 Sup. Ct. 868, 81 L. Ed. 1245), the Supreme Court of the United States discussed at length the power of a state or legislative body to make classifications of property for purposes of taxation. Involved in

that case was the question of the constitutionality of the unemployment insurance compensation act of Alabama; and it was contended that the act in question constituted an infringement of the due process and equal protection clauses, on the ground that there was exempted from the provisions of the act agricultural laborers, domestic servants, employees of charitable institutions and interstate railways, etc. In other words, the basis of the constitutional attack was an alleged discrimination. Answering the contention made, the court, through Mr. Justice Stone, said: "It is inherent in the exercise of the power to tax that a State be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a State any rigid rule of equality of taxation (citing cases). This court has repeatedly held that inequalities which results from a singling out of one particular class for taxation or exemption infringe no constitutional limitation (citing cases). Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts that would support it." (Citing cases.) The court further said: "This restriction upon the judicial function, in passing on the constitutionality of a statute, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limitations of the constitution. In the nature of the case it can not record a complete catalog of the considerations which move its members to enact laws. In the absence of such a record courts can not assume that its act is capricious, or that, with its informed acquaintance with the local condition, to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

For other rulings on this same general subject by the Supreme Court of the United States, see *Carley* v. *Snook*,

281 U. S. 66, 50 S. C. 204; *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 55 S. C. 709, 79 L. Ed. 1439; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 52 S. C. 595; *Clark* v. *Poor*, 274 U. S. 554, 47 S. C. 702; and *Morf* v. *Bingham*, 298 U. S. 412. We think that the general assembly can, for the purpose of taxation of this character, make classifications of carriers by truck, and make as one class those operating for hire either as contract or common carriers and the other as carriers not for hire. A rational basis for such classification readily appears. The carrier not for hire transports over the highways his own goods or property. He uses the highways only as the circumstances and exigencies of his own business required. His use of the highways is incidental only, while the carrier for hire operates over the highways transporting property of others, and charges compensation therefor. He makes the highways his place of business, and the natural tendency will of course be for him to use the highway more, truck for truck, than does the carrier not for hire. In many cases courts of last resort have held that the classification is justified; that the lawmaking body may tax the common carrier for hire using the highways and exempt altogether the carrier not for hire. Like classifications for similar purposes have been upheld by the courts generally. In *Bekins Van Lines* v. *Riley*, 280 U. S. 80, 50 S. C. 64, the Supreme Court of the United States was asked to strike down an amendment to the Constitution of California and statutes of that State laying upon common carriers engaged in transporting freight by motor vehicles for hire along public highways between fixed termini and over regular routes in California a tax upon their gross receipts, while other carriers were subjected to different and less burdensome taxation. The court held that there was no violation of the equal protection clause, "since it can not be said that the classification lacks any reasonable basis." In the opinion it was said: "Appellants voluntarily assumed the position of common carriers operating between fixed termini and enjoy all consequent benefits. That a marked distinction exists between common and private carriers by auto vehicles appears from *Frost* v. *Railroad Commission*, 271 U. S. 583, 46 S. C. 605, 70 L. Ed. 1101, and

Michigan Public Utilities Commission v. *Duke*, 266 U. S. 570, 45 S. C. 191, 69 L. Ed. 445. Sufficient reasons for placing common carriers, operating as appellants do, in a special class are pointed out by *Raymond* v. *Holm*, 165 Minn. 215, 206 N. W. 166; *State* v. *LeFebvre*, 174 Minn. 248, 219 N. W. 167; *Iowa Motor Vehicle Assn.* v. *Board of Railroad Commissioners*, 207 Iowa 461, 221 N. W. 364; *Liberty Highway Co.* v. *Michigan Public Utilities Commission*, 294 Fed. 703. Their use of the highways probably will be regular and frequent, and therefore unusually destructive thereto. Also it will expose the public to dangers exceeding those consequent upon the occasional movements of other carriers." See also the annotations appended to the report of the case of *Public Service Commission of Wyoming* v. *Grimshaw*, 49 Wy. 158, 52 Pac. 2nd 1, 109 A. L. R. 534, 566.

2. The maintenance tax act is also criticised by plaintiff in error in that in each main classification, that is to say, the carriers for hire and the carriers not for hire, there is set up a sub-classification based on the manufacturer's rated capacity of the vehicles used, and fixing a different rate of tax according to the manufacturer's rated capacity, and that there is no relationship between the manufacturer's rated capacity of a truck or motor vehicle and its weight, and consequently no reasonable relationship between the manufacturer's rated capacity and the wear and tear that such vehicle will cause to the highways by its use. The affidavit of illegality recites that "Rated capacity denotes the power of the motor, and not the weight or carrying capacity of the body of the truck." Even so, it would seem that the manufacturer's rated capacity of a motor vehicle has a direct and natural relation to the propensities of the vehicle to injure the highways, and to create public hazards. To make a classification based on the horsepower of the motor is not an arbitrary classification. It was expressly so decided in *Lee* v. *State*, 163 Ga. 239, 242; in *Hendrick* v. *Maryland*, 235 U. S. 610, 35 S. C. 140, 59 L. Ed. 385, and in *Kane* v. *New Jersey*, 242 U. S. 160, 167, 37 S. C. 30, 61 L. Ed. 222. See also *Hicklin* v. *Coney*, 290 U. S. 169, 54 S. C. 142, 78 L. Ed. —; *Carley* v. *Snook*, *supra*.

3. Still another ground of attack is that the tax collected is not used on the highways over which the plaintiff in error operates its trucks, but under the terms of the act it is allocated to rural post roads; that it is impossible for it to use the rural post roads of Georgia, because its routes within this State have been limited by the certificate granted it by the Interstate Commerce Commission pursuant to the Federal Motor Carrier Act of 1935. U. S. C. A. title 49, Sections 301, 306. However, the privilege granted the carrier by the maintenance tax act of 1937 here under attack is unlimited. Under it, the carrier, provided it complies with other requirements of law as to license fees, etc., may use every road in the system, including those to the maintenance of which the tax here challenged is allocated, to-wit, those roads, to use the words of the statute, in the "United States rural post roads division of the State highway of Georgia." In *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission, supra,* it was said: "One who receives the privilege without limit is not wronged by his own refusal to enjoy it as frequently as he may." The decision in *Clark* v. *Poor, supra,* dealt with an Ohio statute, and is in point here. It was there held: "A State regulation providing that, before operating over the State highways, a common carrier by motor shall apply for and obtain a certificate or permit therefor from the State commission, and shall pay an extra tax for the maintenance and repair of the highways and for the administration and enforcement of the laws governing their use, is constitutional though applied to carriers engaged exclusively in interstate commerce * * * that the tax so exacted is not all used for maintenance and repair of the highways, but some of it for defraying expenses of the commission in administration and enforcement of the act, and some for other purposes, is no concern of the taxpayer, it be assessed for a proper purpose and not unreasonable in amount." In the opinion it was said: "The plaintiffs claim, as applied to them, the act violates the commerce clause of the Federal constitution. They insist, that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the State; that it is without power to require that before using its highways they apply for and obtain a cer-

tificate; and that it is also without power to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, under Section 614-94, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the State to insure safety and convenience and the conservation of the highways. Citing *Morris* v. *Duby* (274 U. S.) 135, 47 S. C. 548; *Hess* v. *Pawloski* (274 U. S.), 352, 47 S. C. 632. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and up-keep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. Citing *Hendrick* v. *Maryland; Kane* v. *New Jersey, supra.* Compare *Packard* v. *Banton,* 264 U. S. 140, 144, 44 S. C. 257, 68 L. Ed. 596." One of the grounds of attack in the case just referred to, it is to be noted, was that not all of the tax was used for the maintenance and repair of the highways; that some of it was used for defraying the expense of the commission in the administration and enforcement of the act, and some for other purposes. The court said: "Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs." The plaintiff in error relies on *Interstate Transit, Inc.,* v. *Lindsey,* 283 U. S. 183, 51 S. C. 380; but it was distinctly ruled in that case that "A detailed examination of the statute under which the tax here challenged was laid makes it clear that the charge was imposed, not as compensation for the use of the highways, but for the privilege of doing the interstate bus business." In the opinion it was said: "While a State may not lay a tax upon the privilege of engaging in interstate commerce, *Sprout* v. *South Bend,* 277 U. S. 163, 48 S. C. 502, it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and regulating the

traffic thereon. Citing *Kane* v. *New Jersey; Clark* v. *Poor; Sprout* v. *South Bend, supra.* As such a charge is a direct burden on interstate commerce, the tax can not be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expenses of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use (*Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, 48 S. C. 230), or by the express allocation of the proceeds of the tax to highway purposes, as in *Clark* v. *Poor, supra,* or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. *Hendrick* v. *Maryland, supra; Interstate Busses Corp.* v. *Holyoke Street Ry.,* 273 U. S. 45, 51, 47 S. C. 298." See also *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission,* 179 Ga. 431, 176 S. E. 487, 295 U. S. 285, *supra.*

4. It follows that the maintenance tax act approved March 30, 1937 (Ga. L. 1937, p. 155), is not violative of article I, section 1, paragraphs 2 and 3 of the constitution of this State, which declare that "Protection to person and property is the paramount duty of government, and shall be impartial and complete," and "No person shall be deprived of life, liberty, or property, except by due process of law;" or of article I, section 8, paragraph 3, of the constitution of the United States, which provides that "The Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes;" or of the due-process clause of the fourteenth amendment of the constitution of the United States, which declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Judgment affirmed.

All the Justices concur.

Filed in office Jul. 20, 1938. K. C. Blackley, C. S. C. Ga.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 260

DIXIE OHIO EXPRESS COMPANY,
Appellant,

versus

STATE REVENUE COMMISSION, *et al.*,
Appellees.

BRIEF OF APPELLANT.

EDGAR WATKINS,
ALLAN WATKINS,
Counsel for Appellant.

ADDRESS:

1025 Citizens & Southern
National Bank Building,
Atlanta, Georgia.

FOOTE & DAVIES CO., ATLANTA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 260

DIXIE OHIO EXPRESS COMPANY,
Appellant,

versus

STATE REVENUE COMMISSION, *et al.*,
Appellees.

BRIEF OF APPELLANT.

I. THE OPINION OF THE COURT BELOW.

The opinion in this case by the Supreme Court of Georgia, rendered June 17, 1938, is reported under the style of *Dixie Ohio Express Company v. State Revenue Commission, et al.*, 186 Ga. —, 197 S. E. 887.

II. JURISDICTION.

The jurisdiction of this court has been discussed in the statement as to jurisdiction filed in compliance with Rule 12. The facts stated hereinafter show a substantial Federal question and the Supreme Court of Georgia held that the statute involved did not violate either the commerce clause or the equal protection clause of the Constitution of the United States (see Opinion, R. 26). Jurisdiction on appeal is supported by decisions of this court in which the jurisdictional facts were similar. *Interstate Transit Com-*

pany v. Lindsey, 283 U. S. 183; *Sprout v. The City of South Bend*, 277 U. S. 163.

III. STATUTE INVOLVED.

The statute involved is the Maintenance Tax Act of 1937, Georgia Laws, 1937, page 155, the material parts of which are set out in the Appendix hereto.

IV. STATEMENT OF THE CASE.

The State Revenue Commission issued a fi. fa. against Dixie Ohio Express Company and caused the same to be levied on a two-ton truck of the appellant. The fi. fa. was issued for the amount of a license fee alleged to be due under the Maintenance Tax Act of 1937 (R. 1, 2). Appellant filed an affidavit of illegality to the levy and gave bond for the eventual condemnation money (R. 3). The Revenue Commission filed a general demurrer to the affidavit which the trial court sustained and ordered the affidavit dismissed (R. 26). This ruling was affirmed by the Supreme Court of Georgia. The affidavit being dismissed on demurrer, the allegations therein must be considered to be true and a summary of the material parts thereof is set out hereinafter.

Dixie Ohio Express Company is an Ohio corporation with its principal office and place of business in that State. It is engaged in transporting property by motor vehicle as a common carrier for hire between points in the States of Ohio, Pennsylvania, New York, Kentucky, Tennessee, Alabama and Georgia. Appellant is engaged only in interstate commerce and does no intrastate commerce whatsoever (R. 3, 4). In operating over the highways of Georgia its trucks do not travel over any of the Rural Post Roads of Georgia as defined in the Act of March 18, 1937, with respect to Rural Post Roads. Georgia Laws, 1937, page 912 at page 914. The appellant's trucks are operated entirely over State Aid Highways composing the State Highway System. Pursuant to Section 206 of the Federal Motor

Carrier Act of 1935 the Dixie Ohio Express Company has been issued a certificate by the Interstate Commerce Commission which limits its operations to these particular highways and under its certificate the appellant is not entitled to operate over the Rural Post Roads of Georgia (R. 9).

The Maintenance Tax Act allocates the entire proceeds of the fees collected thereunder to the maintenance and construction of Rural Post Roads (R. 9, 10).

The appellant owns approximately one hundred pieces of equipment, consisting of 1½-ton and 2-ton straight trucks and 1½-ton and 2-ton tractors which are used to pull trailers, each weighing approximately 4,000 pounds. The appellant has purchased a $3.00 license tag and a $25.00 Georgia Public Service tag for each truck and a $2.00 for hire chauffeur's license for each of the drivers. The appellant has paid in addition to these taxes a State tax of six cents per gallon for each gallon of gasoline purchased in the State of Georgia and its purchases amount to approximately 90,000 gallons per year (R. 8, 9). For convenience, the parties agreed to deposit all moneys alleged to be due under the Act in escrow pending the outcome of this action. For this reason, the entire operations of the appellant are to be considered. In accordance with the agreement, appellant has deposited approximately $4,000.00, which amount is equal to the fees alleged to be due under the Maintenance Act for the year 1937 (R. 6, 8).

The Maintenance Tax Act levies a fee of $50.00 on trucks of a manufacturer's rated capacity of 1½-tons, $75.00 for trucks of a manufacturer's rated capacity of 2-tons in the event that the trucks are operated for hire and if operated not for hire the corresponding fees are $15.00 and $30.00, respectively. Trailers of a factory weight of 4,000 pounds are required to pay a fee of $50.00 for each trailer operated for hire and $30.00 if operated not for hire. (See Appendix, Sec. 3B, C, D, E, of this Act.) Manufacturer's rated capacity and factory weight have no relationship to the

actual weight of the vehicle and no relationship with respect to the use such vehicles would make of the highways because a truck of a rated capacity of one-ton may weigh far in excess of a truck of a rated capacity of two or three tons. Rated capacity differs greatly with the actual weight of the trucks. A 1½-ton tractor weighs far less than a 1½-ton straight truck. A combination of a tractor and trailer pays more than twice the fee required of a straight truck of approximately the same weight, even though the tractor-trailer unit would cause less wear and tear to the highways than would the straight truck, because of the concentration of weight (R. 4, 5).

There is a discrimination against carriers for hire in favor of carriers not for hire because the for hire trucks pay much larger fees than the not for hire trucks. There are 69,503 not for hire trucks operating over the highways of Georgia and only 2,943 for hire trucks and the vehicles operating not for hire travel more miles over the State highways than do the for hire trucks (R. 5). In addition to the larger fees required under the Maintenance Tax, for hire carriers are required to purchase the $25.00 Georgia Public Service tags while other trucks are exempt. The Georgia Public Service Commission has very little regulatory power with respect to interstate operations (R. 7, 8).

The taxes paid by the motor vehicle industry, exclusive of the Maintenance Tax, more than pays for the cost of maintaining and constructing the highways of the State. Last year the State collected $1,305,999.71 from the sale of $3.00 tags, and as required by statute $1,209,495.05 was paid to the State Highway Fund to be used for State-Aid Roads. The remainder was used for regulatory purposes, such as sheriff fees and expenses of the Revenue Commission (R. 6, 7).

The Georgia Public Service Commission collected $73,565.00 for registration fees from carriers for hire, and as required by the Motor Carriers Act of 1931 (Georgia Code,

1933, Sec. 68-623) $28,341.12 was paid into the Highway Fund for State-Aid Roads, the remainder being used to defray regulatory expenses of the Commission (R. 7).

The State collected $17,525,616.25 from the gasoline tax and under the statute two-thirds of this sum is required to be paid to the Highway Fund for State-Aid Roads (R. 8). The State Highway Department for the same year spent only $11,127,258.38 for highway construction and of the sum expended the Federal Government contributed $3,721,489.90 (R. 21). The motor vehicle industry paid sixty-two per cent. of the entire taxes collected by the State from all sources. Less than thirty per cent. of this revenue was spent for highway purposes (R. 10, 11).

Eleven per cent. of the entire mileage traveled by the Dixie Ohio Express Company is traveled within the boundaries of the State of Georgia. The State of Georgia collects far more than eleven per cent. of the total taxes paid by the appellant to all of the other six States through which it operates and if appellant were required to pay the same amount of taxes to the other States it would be unable to operate at a profit (R. 8, 9).

The affidavit of illegality alleged that the Maintenance Tax Act of 1937 is unconstitutional in that it violates the commerce clause of the Constitution of the United States and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States (R. 11, 12).

V. SPECIFICATIONS OF ERROR.

The Supreme Court of Georgia erred in holding:

(1) That the statute involved was not unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that the appellant herein is a common carrier for hire engaged exclusively in interstate commerce, operating its vehicles over the State highways of Georgia and the statute levies a tax on the

appellant, the proceeds of which are used entirely for the maintenance of Rural Post Roads which appellant does not and can not use.

(2) That the statute involved herein was not unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that the statute levied a tax which was graduated according to the manufacturer's rated capacity of trucks and the factory weight of trailers and was made applicable to the appellant, a common carrier for hire operating both types of vehicle exclusively in interstate commerce.

(3) That the statute involved herein was not unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that exclusive of the tax involved herein the appellant, a common carrier for hire engaged exclusively in interstate commerce, paid other license fees and the taxes for all vehicles operated in the State of Georgia, the combined total of which was more than sufficient to pay its proportionate share of the expenses of motor vehicle regulation and for its use of the highway.

(4) In holding that the statute herein involved was not unconstitutional as being repugnant to the commerce clause of the Constitution of the United States and also the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, the facts showing that the statute required a much higher tax on vehicles of the appellant, operated as a common carrier for hire exclusively in interstate commerce, than was required of identical vehicles not operated for hire, even though there are more than twenty times as many carriers operating not for hire as there are carriers operating for hire on the highways of the State of Georgia and that carriers for hire are required to pay other fees that are not exacted of carriers operating not for hire.

VI. SUMMARY OF ARGUMENT.

POINT A. The Maintenance Tax Act violates the commerce clause of the Constitution of the United States because it levies a flat tax on vehicles of the appellant, which are engaged exclusively in interstate commerce, the entire proceeds of which are used to construct and maintain highways which appellant does not and can not use.

POINT B. The Maintenance Tax Act is unconstitutional as applied to appellant because the tax prescribed thereby is graduated according to manufacturer's rated capacity and factory weight of the vehicles and bears no reasonable relationship to the use of the highway by appellant and therefore the tax constitutes a direct unreasonable burden upon the exclusively interstate business of appellant and as such is in violation of the commerce clause of the Constitution of the United States.

POINT C. The Maintenance Tax Act is in violation of the commerce clause of the Constitution of the United States because exclusive of the maintenance tax prescribed the appellant is required to pay other license fees and taxes which more than compensate the State for the expense of regulation and the costs of maintaining its highways and therefore the fees levied under the Maintenance Tax Act constitute a direct burden on the interstate business of the appellant.

POINT D. The Maintenance Tax Act levies a much higher tax on vehicles of the appellant which are operated for hire than upon identical vehicles not operated for hire, even though both types of vehicles are operating in interstate commerce and because of the different measure of fees required there results a discrimination against appellant in favor of carriers operating not for hire and further results in placing an unreasonable burden on the interstate business of the appellant, which is in violation of the equal protection clause of the Fourteenth Amendment to the Con-

stitution of the United States and the commerce clause of the Constitution of the United States.

VII. ARGUMENT AND AUTHORITIES.

POINT A.

The Allocation of the Proceeds of the Tax to Highways Which Appellant Can Not Use Is An Unconstitutional Burden On Interstate Commerce.

This court has numerous times held that the authority of a State to levy a tax on interstate motor vehicles is limited to two purposes, to-wit: (1) to defray the expenses of regulation under the State police power; and (2) to compensate for the privilege of using the highways of the State.

The Supreme Court of Georgia clearly construed the Georgia Maintenance Tax Act as falling within the latter purpose. *Dixie Ohio Express Company v. State Revenue Commission,* 186 Ga. —, 197 S. E. 887 at 889.

The legality of the fees levied under Section 3 of the Maintenance Tax Act can not be sustained as to the appellant if they are shown to be an unreasonable charge for the privilege of using the highways of Georgia. *Clark v. Poor,* 274 U. S. 554.

Prior to 1937 there were two classes of public roads in the State of Georgia: (1) State-Aid Highways composing a State Highway System(1) and (2) Rural Post Roads and secondary roads(2).

(1) Section 95-1701, Georgia Code, 1933. There is hereby created a system of State-Aid Roads for the purpose of inter-connecting the several county seats, which shall be designated, constructed, improved and maintained by the State through the State Highway Department, under the provisions of law; and the term "State-Aid Roads" shall include the State or interstate bridges and other subsidiary structures necessary or desirable in the construction of said roads.

(2) Section 95-102, Georgia Code, 1933. All roads used as post roads which are part of rural postal routes shall be deemed public roads, and it shall be the duty of the county commissioners or the ordinary, as the case may be, to construct and maintain said roads in a reasonably passable condition as other public roads of the county are maintained.

The former are the regularly traveled highways and are maintained by the State Highway Department, while the latter are under the control of the local county governments. The passage of the Maintenance Tax Act and the Rural Post Roads Act changed the system of highway maintenance of the rural roads to some extent.

Section 11 of the Maintenance Tax Act, 1937, Georgia Laws, 1937, page 166, allocates all moneys derived from the fees levied thereunder to the Director of the United States Rural Post Roads and further requires that the moneys shall be prorated according to the number of miles of rural post roads in the counties of the State.

The companion Act also passed in 1937 defines United States Rural Post Roads as all roads, not included in the present highway system, over which mail is carried. Georgia Laws, 1937, 912 at 914[3].

The trucks of appellant travel only over State-Aid Roads or highways known as a part of the State Highway System and do not operate a single mile over the Rural Post Roads as defined in the Post Roads Act (R. 8, 9).

It is impossible for the appellant to use the Post Roads of Georgia because its routes in the State of Georgia have been limited by the certificate granted to it by the Interstate Commerce Commission pursuant to the Federal Motor Carrier Act of 1935. (Title 49 U. S. C. A., Sec. 306) (R. 10).

The statute in the case at bar is identical in effect with the statute this court held unconstitutional in *Interstate Transit Company v. Lindsey,* 283 U. S. 183. In that case

(3) The term "Rural Post Roads" shall mean all roads and highways in the several counties of the State of Georgia over which U. S. mail is carried, not included in the present highway system. The term "Farm-to-Market Roads" in this Act shall mean all public roads and highways in the several counties of the State of Georgia, other than U. S. Post Roads and/or State-Aid Roads.

the Tennessee statute imposed a flat tax graduated according to carrying capacity of the vehicle. The tax was intended as a fee for the use of the highway. The Tennessee Act provided that the proceeds of the tax shall go into the general funds of the State. This tax was also imposed in addition to other motor vehicle fees. In holding such a flat tax based on carrying capacity violated the commerce clause of the Constitution, the court, at page 188, said:

> "The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting § 4 of the 1927 Act with those statutes which admittedly provide for defraying the cost of constructing and maintaining highways and regulating traffic thereon. The former declares specifically in connection with the privilege tax on interstate busses that the proceeds 'shall go and belong exclusively to the general funds of the State.' On the other hand, in the legislation by which Tennessee has provided for defraying the cost of constructing and maintaining the State highways and regulating motor traffic, it has been the consistent practice to prescribe that monies raised for this purpose shall be segregated and go into the Highway Fund."

The case at bar and the *Lindsey Case* are identical, except that in the *Lindsey Case* the proceeds of the tax went to the general funds of the State and in the case at bar the proceeds are allocated to a class of highways which this carrier does not and can not use. In neither case were the fees used for the benefit of the carrier involved and in both cases the tax could be supported only if it was a reasonable fee for the use of the highways. The tax in the case at bar can not be said to be a fee for the use of the highways when it is used for a purpose entirely foreign to the use this carrier makes or can make of the highways. As far as the appellant is concerned, the proceeds might well be placed in the general treasury fund. The purpose of the Maintenance Tax Act is to construct and maintain rural roads which are not traveled by the appellant. This is an at-

tempt by the legislature to make the interstate carriers pay for rural roads which were heretofore maintained by the local county governments. This scheme of the legislature is unconstitutional in that it places a direct burden upon the interstate business of the appellant and is in no way a charge for the use it makes of the highways of Georgia. This is particularly true when it is shown that appellant pays existing motor vehicle taxes sufficient to pay its proportional share of the expense of maintaining this system of State-Aid Roads.

In *Carley & Hamilton v. Snook,* 281 U. S. 66, an intrastate carrier attacked a California statute which imposed a tax on the carrier for the use of streets that the carrier did not use and in sustaining the validity of the tax Justice Stone indicated that such a tax would be invalid as to an interstate operator. At page 70 it was stated:

> "Appellants insist that the registration fees imposed by § 77 (b) and (c) are in effect tolls for the use of the highways maintained by the State * * *, and as they pay the license tax imposed by the cities for the use of city streets, the exaction of the additional 'tolls' with respect to highways outside of cities, which appellants in No. 86 do not use and which the appellants in No. 267 use less than the city streets, is a violation of the 14th Amendment.
>
> "This argument is based upon cases in this court arising, not under the 14th Amendment, but the commerce clause of the Constitution, where the tax assailed was levied by a State on interstate carriers and purported to be exacted for their use of the State highways."

POINT B.

Flat Fees Graduated According to Manufacturer's Rated Capacity or Factory Weight Constitute An Unreasonable Burden On Interstate Commerce.

Appellant recognizes that there are rulings of this court which have sustained motor vehicle license fees based on

carrying capacity or horsepower of the motor, but insists the case at bar is not governed by these decisions. This court sustained a license fee based on carrying capacity of the vehicle in *Hicklin v. Coney,* 290 U. S. 169, but the court pointed out the requisites of such a statute at page 173, as follows:

> "The State court held that the fees 'are collected, as provided for by § 8517, for the purpose of maintaining the *public highways over which such motor vehicles shall operate,* as compensation for their use.' The statute provides for the segregation, for this purpose, of the moneys collected."

There is no such provision in the Georgia Maintenance Tax Act and furthermore Section 11 thereof allocates the money collected to certain rural roads which appellant can not use. The maintenance tax is not designed as a fee for the use and construction of highways generally. The legislature apparently omitted such a provision intentionally. Section 11-a of the Maintenance Tax Act repeals Chapter 92-29 of the 1933 Georgia Code, which levied a mileage tax on carriers for hire, and the Act repealed contained a clear definition of its purpose by stating that the tax was imposed as a "fair contribution to the cost of the constructing and maintaining the highways of the State." Section 92-2922, Code, 1933.

The omission of a similar provision in the Maintenance Tax Act, coupled with the provision as to Rural Post Roads, shows that the tax is not a fee designed for maintaining and constructing the State highway system of roads. The companion Act passed at the same time as the Maintenance Tax Act, creating the U. S. Rural Post Roads Division, indicates that the purpose was to raise money to match appropriations from the Federal Govern-

ment in connection with the construction of Rural Post Roads. See Section 16 of the Act, page 917[4].

Rated capacity and factory weight have no direct bearing on the wear and tear a vehicle will cause the highway. The affidavit of illegality alleged that a 1½-ton straight truck causes more damage to the highway than does a 1½-ton tractor and a 4,000-pound trailer. This is because of the concentration of weight of the straight truck. A tractor-trailer unit of appellant can carry but 25 per cent. more freight than the straight truck, but is required to pay 150 per cent. more license fee (R. 5). Such inconsistent charges can not be said to constitute a reasonable measure for the use of the highway. See *Roadway Express v. Murray*, 60 Fed. (2d) 293, 294.

This measure of taxation on interstate carriers was condemned by the court in *Interstate Transit Company v. Lindsey*, supra, and at page 190 the proper measure was suggested by Mr. Justice Brandeis:

> "But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, can not be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the State. Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, supra. In the present Act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage traveled, or even with

[4] Be it further enacted, That if any provisions of this Act are inconsistent with or contrary to any rules, regulations or requirements of the Federal Bureau of Roads and/or other Federal agencies, the State Highway Board is hereby authorized and empowered to waive such provisions of this Act in order to meet any such rule, regulation, or requirement, it being the purpose of this Act to enable the Board to comply with any rule, regulation or requirement of the Federal Government in order to cooperate with the Federal Government and all its agencies to procure all possible Federal aid and assistance for construction and/or maintenance of U. S. Rural Post Roads and/or Farm-to-Market Roads.

the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity."

This court reasoned along similar lines in *Sprout v. South Bend*, 277 U. S. 163. The tax in that case was a flat tax based on the seating capacity of the vehicle and the language of the ordinance did not indicate that the proceeds of the tax were to be applied to the construction or maintenance of the city streets.

This court has sustained a flat fee in *Hicklin v. Coney*, supra, *Clark v. Poor*, supra, and *Hendrick v. Maryland*, 235 U. S. 610. However, in each of these cases the statute attacked was designed to defray the expenses *both* of police regulation and the maintenance of highways and there was no evidence that the fees exceeded the *dual* purpose for which they were imposed. The distinction between regulatory acts and taxes levied as compensation for the use of the highway was clearly pointed out in *Prouty v. Coyne*, 55 Fed. (2d) 289, 292. In that case a flat tax based on chassis weight was condemned.

The Supreme Court of Georgia and the appellee cite the case of *Aero Mayflower Transit Company v. Georgia Public Service Commission*, 295 U. S. 285, to sustain the constitutionality of the maintenance tax. It is true that the Motor Vehicle Act there involved levied a flat fee of $25.00 per vehicle on interstate carriers for hire, but that Act was construed by the Supreme Court of Georgia to be for the *dual* purpose of providing for police regulation and a fee for the use of the highways. *Aero Mayflower Transit Company v. Georgia Public Service Commission*, 179 Ga. 431 (2), 176 S. E. 487. The graduated fees under the Maintenance Tax Act are now imposed in addition to the $25.00 fee heretofore levied for the purpose of regulation and highway maintenance. A straight mileage tax has been

approved as a proper method of taxation of interstate carriers for the privilege of using the highways. *Interstate Busses Corp. v. Blodgett,* 276 U. S. 245. A charge per ton mile is another reasonable method suggested in *Continental Baking Co. v. Woodring,* 286 U. S. 352.

In view of the existing motor vehicle taxes, the fee levied by the Maintenance Tax Act is beyond the legislative authority and constitutes a direct tax on the interstate business of the appellant without any reference to the use it makes of the highways of Georgia.

POINT C.

The Taxes Exacted Under Existing Motor Vehicle Statutes Exclusive of the Maintenance Tax Clearly Exceed the Cost of the Maintenance of the Highways and Thereby Render the Fees Prescribed Under the Maintenance Tax Act Unconstitutional.

The Maintenance Tax Act contains no regulatory provisions and is solely a revenue measure. It lays a direct tax on the appellant and can be sustained only as a reasonable fee for the use made of the highways. Under existing laws the appellant has paid a $3.00 license fee for each truck. Georgia Code, 1933, Section 68-211, as amended by Georgia Laws, 1935, page 157[5].

These license fees are allocated to the State Highway Department for the purpose of maintaining the State-Aid Roads. Section 94-1703, 1933 Georgia Code[6].

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(5) Schedule of annual fees for vehicles.—The annual fees for licensing the operation of the vehicles required by this chapter to be registered and licensed, shall be $3.00 for each such vehicle registered * * *.

(6) All funds realized from motor-vehicle licenses or fees, less the expense of collecting the same as provided by law, shall be deposited with the State Treasurer, to the credit of and as a part of the State-Aid Road fund, and said funds shall be controlled and disbursed under the provisions of this law.

Appellant has paid a license fee of $25.00 per vehicle, as required by Section 68-623 of the 1933 Georgia Code[7].

Under Section 6 of the Act to regulate public safety the appellant is required to purchase a $2.00 license for each chauffeur operating a vehicle for hire. Georgia Laws, 1937, page 346.

The fees so collected are used to pay the expenses of the safety regulation. Section 9 of the Safety Act, Georgia Laws, 1937, page 348.

Under the existing motor fuel law, purchasers of gasoline are required to pay a tax of six cents per gallon, four cents of which is used for the maintenance and construction of State-Aid Roads and one cent for county roads and the remaining other cent for school purposes. Georgia Laws, 1937, page 180[8]. The appellant purchased ap-

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(7) Every motor common carrier shall annually on or before January first, as long as such certificate remains in force, or before the vehicle is put into use, as to a vehicle put into use during the course of the year, make application to the Commission for registration of all motor vehicles to be operated under said certificate, in manner and form as the Commission may by rule or regulation prescribe, and shall pay to the Commission a fee of $25 for each vehicle for the registration of the same and the issuance of a permit or license to operate the same * * *. The money derived from the issuance and transfer of certificates and from the registration fee shall be subject to be used by the Commission for the administration and enforcement of this law, and any sum which may be left over and unexpended on the first day of January of each year shall be paid to the State Treasurer and shall be disbursed by him and paid to the State Highway Board for use in maintenance and repair of the highways as in the discretion of the Highway Board may be directed.

(8) (a) The proceeds of the six ($0.06) cents per gallon tax on motor fuel shall be paid to the State Treasurer and by him distributed as follows:

An amount equal to—

(1) Four ($0.04) cents per gallon shall be set aside to the State Highway Fund, for use in construction on the State Highway System of Roads, or State-Aid System of Roads; and

(2) One ($0.01) cent per gallon shall be set aside to be distributed to the several counties of the State to be used exclusively for the construction and maintenance of public roads; and

(3) One ($0.01) cent per gallon shall be set aside to the public schools of this State for an equalization fund.

proximately 90,000 gallons of gasoline in the State of Georgia in the year 1936 and thereby paid the State the sum of $5,400.00 (R. 8).

Exclusive of the maintenance tax the appellant has paid the State of Georgia approximately $8,500.00 per year in motor vehicle fees and under the present Maintenance Tax Act will be required to pay in addition approximately $6,000.00 per year. Such amounts far exceed a reasonable fee for the use appellant makes of the highways of Georgia (R. 7, 8).

Less than eleven per cent. of its total mileage is traveled in Georgia and if the taxes of the other States were the same, it could not continue to operate (R. 9). If the Georgia tax is sustained it opens the way for the other States in which appellant operates to exact the same fees and thereby destroys an interstate transportation business. A State can not prohibit an interstate operation but if this statute is sustained, it enables a State to do indirectly what it can not do directly.

Under the motor vehicle laws existing before the Maintenance Tax Act was passed, the State of Georgia collected funds far in excess of the amounts it has expended for the regulation of motor carriers and for the maintenance and construction of its highways. In 1936 $1,305,999.71 was collected from the sale of the $3.00 tags, of which 97 per cent. was expended for State-Aid Roads and three per cent. for regulatory purposes. $73,565.00 was collected from carriers for hire from the $25.00 Public Service Commission licenses, of which $46,000.00 was expended for regulation and $28,000.00 was transferred to the Highway Fund for the benefit of State-Aid Highways (R. 7). For the same year the State collected a total of $17,525,616.25 in gasoline taxes and four cents of each six cents collected should have been expended on State-Aid Highways (R. 8).

From these motor vehicle taxes the State collected over $18,000,000.00, which amounted to 62 per cent. of the total revenue collected by the State. For the same year, the State spent only $11,127,258.30 for highway maintenance and construction and of this sum expended the Federal Government contributed $3,721,489.90 (R. 10, 11, 21).

Taxes existing before the passage of the Maintenance Tax Act more than paid for the cost of regulation and highway maintenance and construction. The difference between the taxes collected and the amounts expended for highway purposes shows that a large part of the taxes was diverted to purposes other than highway maintenance and had there been no diversion there would have been available an additional $10,000,000.00 for highway purposes. The Congress has provided that only States which use the funds derived from motor vehicle taxes for road construction purposes shall be entitled to receive their full proportion of Federal Highway Aid. Title 23 U. S. C. A., Sec. 55, 48 Stat. 995. Cf. *Opinion of the Attorney-General of the United States, Volume 39, Opinion 43, April 18, 1938.*

In the recent case of *Ingels v. Morf,* 300 U. S. 290, this court held invalid a State motor vehicle Act on the ground that a State can not exact greater fees than the cost of the services rendered. In that case a flat fee of $15.00 was imposed on vehicles being towed into the State for the purpose of sale and it was provided that the proceeds of this tax were to be used to defray the expenses of regulation. The evidence indicated the amount of money received from this tax would far exceed the cost of the regulation, and at page 297 it was stated:

> "We can not say that the evidence does not support the conclusion of the trial court that the cost of policing would be amply met by a license fee of one-third of the amount so charged. The administrative expense of issuing the permits appears not to have been included, but the testimony that that expense was about

> $5.00 per car does not bridge the arithmetical gap, and does not impeach the court's conclusion that the permit fee bears no reasonable relation to the total cost of regulation, to defray which it is collected. It rightly held that the licensing provisions of the statute impose an unconstitutional burden on interstate commerce."

The case at bar is even stronger, for under existing laws reasonable compensation for the use of the highway has been paid and therefore the additional fees levied by the Maintenance Tax Act became a direct tax on the privilege of doing an interstate business and as such violates the commerce clause of the Constitution of the United States.

POINT D.

The Different Measure of Fees Discriminates Against Carriers for Hire and In Favor of Carriers Operating Not for Hire in Violation of Both the Commerce Clause and the Equal Protection Clause of the Constitution of the United States.

Under the Maintenance Tax Act the 1½-ton truck operating for hire is required to pay a $50.00 license fee, whereas the same type truck operating not for hire pays $15.00. The corresponding fees for a two-ton truck are $75.00 and $30.00 respectively. Fees for trailers are on approximately the same ratio (R. 4).

There is no justification for the much higher rate upon the for hire operator. It can not be said that the not for hire carrier requires less regulation and therefore the classification is reasonable because the question of regulation of the two-type carriers has been provided for in another motor vehicle statute which requires the for hire carriers to pay $25.00 per truck for a Georgia Public Service tag which is not required of the carriers operating not for hire. See Sections 68-601 (e) and 68-623 of the 1933 Code. *Aero Mayflower v. Georgia Public Service Commission,* supra.

Under the Public Safety Act for hire operators must pay $2.00 for a chauffeur's license and not for hire operators $1.00. Sections 6 and 8, Georgia Laws, 1937, pages 346 and 347. The only license fee required of a truck operating as a not for hire carrier is the $3.00 license fee (R. 22).

The Maintenance Tax Act is a revenue measure and contains no regulatory provisions and as applied to the appellant or other interstate operators it can be sustained only if it is a reasonable charge for the use made of the highways.

In *Aero Mayflower Transit Company v. Georgia Public Service Commission,* supra, it was stated at page 289 of the U. S. Report:

> "The fee is for the privilege for a use as extensive as the carrier wills that it shall be."

Here appellant can not "will" to use post roads, because its Federal permit is limited to other roads. Therefore, the difference in the amount of tax can not be justified by saying that the carriers operating not for hire use the highways less than the carriers operating for hire. This is particularly true in this case when the record shows that there are 69,503 trucks operating over the highways of Georgia not for hire and there are only 2,943 trucks operated for hire (R. 5). In addition, the use of the highways is now limited by the Interstate Commerce Commission (R. 10).

The Supreme Court of Georgia held that it was proper for the State to classify carriers into two groups, for hire and not for hire, and levy a higher tax on the former. *Dixie Ohio Express Company v. State Revenue Commission,* 197 S. E. 887 at 890. The Georgia court overlooked the fact that the appellant was engaged in interstate commerce and that the power of the State was limited to levying a fee commensurate with the privileges granted.

In the case of *Interstate Transit Company v. Lindsey*, supra, this court answered the argument of the Georgia court by stating at page 190:

> "But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, can not be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the State. Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, supra. In the present Act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage traveled, or even with the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity."

The statute challenged herein contains no regulatory provisions and allocates all of the proceeds of the tax to the maintenance of Rural Post Roads and therefore as applied to interstate carriers, either for hire or not for hire, the fee charged must be a reasonable charge for the privilege of using the highways or it violates the commerce clause of the Constitution.

Under this statute a truck with the same rated capacity as a truck of the appellant may operate over the same route as the appellant and pay a much smaller fee than appellant, even though both are engaged in interstate commerce. Can it be said that the fees are commensurate with the use of the highway when the use is identical? Either the fees are too large for the for hire trucks or too low for the ones operating not for hire. The language used by Justice Brandeis in the case of *Sprout v. South Bend*, 277 U. S. 163, at page 170, is equally applicable to the present situation. It was there stated:

"A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways."

The maintenance tax levied on appellant is either an unreasonable fee for the use of the highway and thereby violates the commerce clause of the Constitution of the United States or it discriminates against the appellant and in favor of operators not for hire using the same type vehicles as appellant and is thereby in violation of the equal protection clause of the Constitution of the United States.

CONCLUSION.

WHEREFORE, it is respectfully submitted that the Maintenance Tax Act of 1937 is unconstitutional and void as being repugnant to the commerce clause of the Constitution of the United States and of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and the decision of the Supreme Court of Georgia should be reversed.

EDGAR WATKINS,
ALLAN WATKINS,
Counsel for Appellant.

Address:

1025 Citizens & Southern National Bank Building,
Atlanta, Georgia.

APPENDIX.

Motor-Buses, Trucks, Trailers—Maintenance Tax and Registration.

(*Ga. Laws, 1937, p. 155*).

An Act to provide for the levy of a tax to be known as a Maintenance Tax to be paid by owners of motor-buses, trucks, and/or trailers operating over the public roads of this State; to repeal Chapter 92-29 of the Georgia Code of 1933, "Motor Carriers for Hire," pertaining to an annual or a mileage tax to be paid by motor carriers for hire; to provide a schedule of rates to be paid; to provide a date upon which said tax will become effective; to provide for the registrations of all motor-buses, trucks and/or trailers affected by this Act with the Director of the Motor Vehicle Division of the State Revenue Commission in the manner that applications and registrations of all motor vehicles are now made; to provide for owners of said vehicles to make oath as to factory weights of same upon registration; to provide for one-half of the tax where vehicles are registered after August 1st up to December 31st, of each year; to provide a penalty for failure to register; to provide that a maintenance tag shall be procured from the Director of the Motor Vehicle Division of the State Revenue Commission upon the payment of the tax herein levied, and to provide for the issuance of a maintenance tag to persons registering under this Act; to provide that the Director of the Motor Vehicle Division of the State Revenue Commission shall not issue a tag until the maintenance tax herein provided for has been paid; to provide for the design of the maintenance tag to be issued upon the payment of tax herein provided; to provide that resident and non-resident owners of such vehicles shall register and pay the tax when making more than two (2) trips in the State from out of the State each month, except where seasonable agricultural

products are hauled; to provide for the allocation of the funds derived from this tax to the United States Rural Post Roads Division of the State Highway Department of Georgia; to provide a saving clause in case any portion of this Act be declared unconstitutional; to provide for the punishment of any person violating the terms of this Act; to provide that said Act shall become effective April 1, 1937; to provide for the exemption of certain trucks and buses from the payment of this tax; to repeal all laws and parts of laws in conflict with this Act, and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same, That from and after the passage of this Act, all persons, firms, corporations, or associations holding title to a motor-bus, truck and/or trailer or having exclusive right to the use thereof for a period of more than thirty (30) days, shall pay a maintenance tax for the operation of such motor-bus, truck, and/or trailer upon and over the public roads of this State, according to the schedule hereinafter provided. The maintenance tax herein provided for shall be in addition to any and all other taxes, license, or registration fees now required under existing laws. Provided, that nothing in this Act shall apply to trucks and buses owned and operated by any political subdivision of this State and used exclusively in its governmental functions. Provided, further, that this Act shall not apply to motor vehicles engaged exclusively in transporting school children and school teachers to and from public schools nor to buses or other motor vehicles operated on fixed routes wholly within the corporate or police limits of municipalities and their environs and/or in connection with the operation of which a franchise or occupational tax is required to be paid to such municipalities. Provided, further, that this Act shall not apply to carriers operating over a route of not more than twenty miles in length and solely between a point in this State and a point within a United States

Military Reservation in this State under special franchise granted by the United States War Department.

Section 2. Be it further enacted by the authority aforesaid, That for the purpose of this Act the following definitions shall apply:

A. Motor-Bus. Any passenger carrying motor vehicle having a passenger seating capacity of eight (8) or more persons.

B. Trucks. A motor-vehicle for the transportation of property, which shall include any self-propelled vehicle designed for use as a traveling power plant or for drawing other vehicles but having no provision for carrying loads independently, except what are commonly known as farm tractors.

C. Trailer. Any vehicle without motive power, designed for carrying persons or property either partially or wholly on its own structure and for being drawn by a self-propelled vehicle and operated over the public roads of this State; that trailer in this Act does not mean trailers used for small luggage or boats.

Section 3. Be it further enacted by the authority aforesaid, That the annual maintenance tax for operation of motor-buses, trucks and/or trailers over the public roads of this State shall be as follows for each vehicle hereinafter named:

A. For each passenger carrying motor-bus the following sums, to-wit:

(This schedule is omitted as not applicable).

B. For each non-passenger carrying motor vehicle or truck not used as a common or contract carrier for hire, the following sums, to-wit:

1. For each non-passenger carrying motor vehicle or truck of less than one ton manufacturer's rated capacity .....$ 5.00

2. For each non-passenger carrying motor vehicle or truck of one ton manufacturer's rated capacity 10.00
3. For each non-passenger carrying motor vehicle or truck of more than one ton and not exceeding one and one-half tons manufacturer's rated capacity 15.00
4. For each non-passenger carrying motor vehicle or truck of more than one and one-half and not exceeding two tons manufacturer's rated capacity 30.00

(The higher brackets are omitted as not being relevant).

C. For each non-passenger carrying motor vehicle or truck used either as a common or contract carrier for hire, the following sums, to-wit:

1. For each non-passenger carrying motor vehicle or truck of less than one ton manufacturer's rated capacity .....$ 10.00
2. For each non-passenger carrying motor vehicle or truck of one ton manufacturer's rated capacity 20.00
3. For each non-passenger carrying motor vehicle or truck of more than one ton and not exceeding one and one-half tons manufacturer's rated capacity 50.00
4. For each non-passenger carrying motor vehicle or truck of more than one and one-half and not exceeding two tons manufacturer's rated capacity 75.00

(The higher brackets are omitted as not being relevant).

D. For each trailer or semi-trailer not used as, or in connection with a non-passenger carrying motor vehicle or truck used as a common or contract carrier for hire the following sums, to-wit:

1. For each trailer or semi-trailer not exceeding 1,000 pounds factory weight .....$ 5.00

2. For each trailer or semi-trailer exceeding 1,000 pounds but not more than 2,000 pounds factory weight 10.00
3. For each trailer or semi-trailer exceeding 2,000 pounds but not more than 3,000 pounds factory weight 20.00
4. For each trailer or semi-trailer exceeding 3,000 pounds but not more than 4,000 pounds factory weight 30.00
5. For each trailer or semi-trailer exceeding 4,000 pounds but not more than 5,000 pounds factory weight 40.00
6. For each trailer or semi-trailer exceeding 5,000 pounds but not exceeding 6,000 pounds factory weight 50.00

(The higher brackets are omitted as not being relevant).

E. For each trailer or semi-trailer used as, or in connection with, a non-passenger carrying motor vehicle or truck used as common or contract carrier for hire, the following sums, to-wit:

1. For each trailer or semi-trailer not exceeding 1,000 pounds factory weight .....$ 10.00
2. For each trailer or semi-trailer exceeding 1,000 pounds but not more than 1,500 pounds factory weight 20.00
3. For each trailer or semi-trailer exceeding 1,500 pounds but not more than 3,000 pounds factory weight 30.00
4. For each trailer or semi-trailer exceeding 3,000 pounds but not more than 4,000 pounds factory weight 50.00
5. For each trailer or semi-trailer exceeding 4,000 pounds but not more than 5,000 pounds factory weight 75.00
6. For each trailer or semi-trailer exceeding 5,000 pounds but not exceeding 6,000 pounds factory weight 100.00

(The higher brackets are omitted as not being relevant).

Provided that all motor drawn hearses or ambulances shall not be included in any of the above schedules but shall pay annually the sum of $25.00 for each of such hearses or ambulances.

12. Providing that nothing in this Act shall be construed to allow what is known as four-wheel trailers to operate on highways of this State after September 30, 1937, unless air brakes or hydraulic brakes are provided.

Section 4. Be it further enacted by the authority aforesaid, That the maintenance tax herein provided for shall become due and payable April 1, 1937, for the year 1937, Provided, however, that no person, firm, corporation or association subject to the payment of this tax shall be required to pay more than three-fourths (¾) of the amounts herein provided for the year 1937.

Section 5. Be it further enacted by the authority aforesaid, That the owners of motor-buses, trucks and/or trailers, shall, on or before the first day of May of the year 1937, and before they shall operate such motor-buses, trucks, and/or trailers, register such vehicle or vehicles in the office of the Director of the Motor Vehicle Division of the State Revenue Commission and obtain a maintenance tag to operate the same for the year 1937. That the application for registration of such vehicle shall be made to the Director of the Motor Vehicle Division of the State Revenue Commission upon blanks prepared by him the same as now required for the registry of motor vehicles where application is made for license or identification tags; Provided, however, that it shall not be necessary after the year 1937 for any person, firm, corporation, or association subject to the tax herein provided to have to register said vehicle except as is now provided for application and registration for the purpose of obtaining a license or identification tag.

Provided, however, that owners upon registration of said vehicles shall make oath before some officer authorized to administer oaths in this State, setting forth the correct factory weight or rating of said vehicle.

Section 6. Be it further enacted by the authority aforesaid, That any person, firm, corporation or association registering any of the said above-named vehicles between the dates of August 1 and December 31 of any year, shall not be required to pay more than one-half of the annual tax herein provided for.

Section 7. Be it further enacted by the authority aforesaid, That any person, firm, corporation, or association failing to pay the tax herein provided within thirty (30) days after same is due and payable, shall pay a penalty of twenty per cent. (20%) for said failure to register said vehicle as is required.

Section 8. Be it further enacted by the authority aforesaid, That beginning January 1, 1938, all persons, firms, corporations or associations subject to the tax herein provided for shall apply for and obtain a maintenance tag on or before the first day of February in each year thereafter and the payment of said maintenance tax shall be required of those subject to the tax at the time that said vehicle is registered with the Director of the Motor Vehicle Division of the State Revenue Commission for payment of license tag fee, and it shall be the duty of said Director to first collect the maintenance tax before issuing a license tag on the application made for registration for a license tag; and it shall be unlawful for said Director to issue a license tag to any person, corporation, firm or association until the maintenance tax herein provided for shall have been paid in full.

Section 9. Be it further enacted by the authority aforesaid, That upon application and registration for license tag for operation of any of the vehicles herein named, payment

of the maintenance tax shall be then and there made, and the Director of the Motor Vehicle Division of the State Revenue Commission shall issue a maintenance tag to person or persons paying said tax which maintenance tag shall have inscribed thereon the words, "Maintenance Tag," and the year for which said tax is paid. Said maintenance tag shall be oval or oblong in shape and not more than three (3") inches in diameter, and shall follow the same color scheme of the license tags for the year in which it is sold.

Section 10. Be it further enacted by the authority aforesaid, That all persons, firms, corporations or associations, whether resident or nonresident of this State making or causing to be made by or through any of their agents, servants or employees more than two (2) trips per month into this State with any of the vehicles herein named shall be liable to and shall pay the tax herein provided for except that any of the named vehicles named herein shall be allowed a maximum of ten (10) trips per month into this State for the purpose of hauling seasonable agricultural products grown in this State without payment of the tax herein provided for.

Be it further enacted, That any person, firm, corporation or association found to be operating any vehicle herein named upon the highways of this State contrary to the provisions of this section shall, in addition to any and all other penalties that may be now or hereafter imposed, be required to pay immediately the tax herein provided for such vehicle.

Section 11. Be it further enacted by the authority aforesaid, That any and all moneys derived from the sale of maintenance tags shall be and the same are hereby allocated to the United States Rural Post Roads Division of the State Highway Department of Georgia, to be expended through the Director thereof, and the said moneys shall be prorated among the several counties of this State accord-

ing to the number of miles of Rural Post Roads in said counties.

Section 11-A. Be it further enacted, That Chapter 92-29, including sections 92-2901 through 92-2926, "Motor Carriers for Hire," of the Georgia Code of 1933, pertaining to an annual or a mileage tax to be paid by motor carriers for hire, be and is hereby repealed.

Section 12. Be it further enacted by the authority aforesaid, That should any of the provisions of this Act be held illegal or unconstitutional, the same shall not vitiate the remaining provisions of said Act, but all such provisions not held illegal or unconstitutional shall remain in full force and effect.

Section 13. Be it further enacted by the authority aforesaid, That all persons, firms, corporations or associations violating the terms of this Act shall be guilty of a misdemeanor and shall be punished as such.

Section 14. Be it further enacted by the authority aforesaid, That this Act shall not take effect until April 1, 1937.

Section 15. Be it further enacted, That the State agency having the duty to collect the taxes herein provided for is authorized and empowered to furnish to its employees collecting or enforcing said taxes such weighing devices as necessary to enforce this Act, and all persons employed to enforce this Act are hereby authorized to stop and/or weigh any truck and/or trailer and/or bus, using any public road of this State.

Section 16. Be it further enacted by the authority aforesaid, That all laws and parts of laws in conflict with this Act be and the same are hereby repealed.

Approved March 30, 1937.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 260

DIXIE OHIO EXPRESS COMPANY,
Appellant,

vs.

STATE REVENUE COMMISSION OF GEORGIA, ET AL.,
Appellees.

BRIEF FOR APPELLEES

M. J. YEOMANS,
Attorney General

B. B. ZELLARS,
Assistant Attorney General

O. H. DUKES,
Special Assistant Attorney General
Attorneys for Appellees.

December 5, 1938.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1938.

DIXIE OHIO EXPRESS COMPANY, *Appellant*,
vs.
STATE REVENUE COMMISSION, ET AL., *Appellees*.
No. 260

BRIEF FOR APPELLEES

STATEMENT OF CASE

This case originated in the Superior Court of Fulton County, Georgia, where the trial court sustained a general demurrer to an affidavit of illegality filed by appellant to an execution issued by the State Revenue Commission of Georgia under the provisions of the Motor Bus Maintenance Tax Act, approved March 30, 1937 (Georgia Laws, 1937, pages 155–167). The Supreme Court of Georgia affirmed the judgment of the trial Court and the case is here on appeal.

STATUTE INVOLVED

A copy of the Act involved is set out in the appendix to the brief of counsel for appellant. By Section 1, it is provided that all persons, firms, corporations, or associations holding title to a motor bus, truck and/or trailer, or having exclusive right to the use thereof for a period of more than thirty (30) days, shall *pay a maintenance tax for the operation of such motor bus, truck and/or trailer upon and over the public roads of this State.* (Italics supplied). Said maintenance tax is to be levied in addition to any and all other taxes, licenses or registration fees required under existing law. The entire amount of the tax collected is, by the terms of the Act, allocated "to the United States Rural Post Roads Division of the

State Highway Department of Georgia, to be expended through the Director thereof, and said money shall be prorated among the several counties of this State according to the number of miles of rural post roads in said counties". (See Section 11 of the Act.) No provision is made for deducting the expense of collection or any part of the tax collected for regulatory purposes.

By Section 2 of the Act certain terms are defined, and by Section 3, the schedule of license fees to be exacted is set out. There are three classifications provided. One is the license fee for the operation of passenger carrying motor buses; another provides the license applicable to and exacted from persons operating non-passenger carrying motor vehicles or trucks not used as contract or common carriers for hire; the third schedule applies to non-passenger carrying motor vehicles or trucks used as common or contract carriers for hire. The license fees prescribed are different under each classification. There is also a classification applying to trailers or semi-trailers and in each of the main classifications above referred to, the trucks or buses are classified according to weight or manufacturer's rated capacity, and the tax fixed according to a graduated scale; that is to say, the larger or heavier or the greater the rated capacity of the truck or bus, the larger the amount of tax exacted.

Section 10 provides that all persons, firms, corporations, or associations, whether resident or non-resident, making or causing to be made by or through any of their agents, servants or employees more than two trips per month into the State with any of the vehicles named shall be liable to and shall pay the tax provided for, except that any of the named vehicles hauling seasonable agricultural products, etc., may make as many as ten trips per month without paying the taxes.

The statute does not undertake to make any difference between the fees or charges applicable to persons operating interstate and the fees applicable to persons operating intrastate. The fee is the same without reference to whether the particular operations are interstate or intrastate. There is

nothing in the Act to indicate that its provisions are aimed at interstate carriers, as such. All carriers falling within any particular classification are treated alike.

Appellant is engaged solely in the transportation business by motor vehicle as a common carrier of commodities general, operating entirely interstate (R. 3, 4).

LEGAL QUESTIONS PRESENTED

The questions presented by the record are:

(1) Whether or not the Georgia Statute is repugnant to the commerce clause of the Constitution of the United States for any of the reasons set out in the assignment of errors (R. 38, 39).

(2) Whether or not the Georgia Statute is repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States for any reason urged in the assignment of errors (R. 39, 40).

ARGUMENT AND CITATION OF AUTHORITIES

The trial court sustained a demurrer to the affidavit of illegality which sought to raise the Constitutional questions as a defense to the execution levied. The Supreme Court of Georgia affirmed this judgment and we wish particularly to call the Court's attention to the opinion of the Georgia Supreme Court, (R. 26–37). This opinion and judgment seems to us to answer every question presented, correctly, clearly and convincingly. But since the judgment is to be reviewed by this Court, we wish first to call attention to certain well established principles and tests which must be applied and made when it is sought to strike down a law regularly enacted by a legislative body.

1. PRESUMPTION AND BURDEN OF PROOF.

First of all, the statute is presumed to be constitutional and

this presumption extends to every ground of attack made by appellant.

In *Munn v. Illinois*, 94 U. S. 124, this court stated the rule as follows:

> "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained."

See also *Gitlow v. New York*, 268 U. S. 652; *Knoxville v. Knoxville Water Company*, 212 U. S. 1, 8; *Aetna Insurance Company v. Hyde*, 275 U. S. 440, 448; *Georgia Railway Co., v. Railroad Commission of Georgia*, 262 U. S. 625; *Townsend v. Yeomans*, 301 U. S., 441–459, 81 L. Ed. 1210, 57 S. Ct. 847; *South Carolina State Highway Department, Et Al v. Barnwell Bros., Inc., Et Al.* .... U. S. .....; 58 S. Ct. 510;

Furthermore, where classifications made in a statute are attacked as unreasonable and discriminatory, the burden is on the complaining party to show that there are no such differences between the class in which he falls and other classes treated differently as will justify the difference in treatment.

Carmichael v. Southern Coal & Coke Co., 301 U. S. 495–531; 81 L. Ed. 1245; 57 S. Ct. 868–874.

In addition, the legislative body is not required to make "meticulous adjustments in an effort to avoid incidental hardships."

Great A. & P. Tea Co., v. Grosjean, 301 U. S. 412, 424; 81 L. Ed. 1193, 1200; 57 S. Ct. 776; *New York Rapid Transit Co. v. City of New York.* .... U. S. ....; 58 S. Ct. 721, 726 (decided by this Court March 28, 1938).

2. THE STATUTE IS NOT REPUGNANT TO THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION FOR ANY REASON ASSIGNED.

It has long been conceded that a state may levy a tax,

reasonable in amount, as compensation for the privilege of using the highways of such state by motor carriers and this is true, even though the particular motor carrier be engaged exclusively in interstate commerce. In *Hendricks vs. Maryland*, 235 U. S., 610, 624, the identical question was considered, and at pages 623 and 624, the Court said:

> "In view of the many decisions of this Court, there can be no serious doubt that where a state, at its own expense, furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce".

See also *Kane v. New Jersey*, 242 U. S. 160, 168, 169, 67 L. Ed. 222, 37 S. Ct. 30; *Clark v. Poor*, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702; *Sprout v. South Bend*, 277 U. S. 163, 169, 170, 72 L. Ed. 853, 48 S. Ct. 502; *Interstate Buses Corp. v. Blodgett*, 276 U. S. 245, 250-252, 72 L. Ed. 551, 48 S. Ct. 230; *Ingels v. Morf*, 300 U. S. 290, 81 L. Ed. 653, 57 S. Ct. 439; *Carley & Hamilton v. Snook*, 281 U. S. 66, 74 L. Ed 704; *Aero Mayflower Transit Co. v. Ga. Public Service Commission*, 295 U. S. 285, 79 L. Ed. 1445; *South Carolina State Highway Department v. Barnwell Bros. et al*, ... U. S. ...., 58 S. Ct. 540.

In Interstate Transit Company v. Lindsey, 283 U. S., pages 183, 186, the Court, amplifying the rule, said:

> "While a state may not lay a tax on the privilege of engaging in interstate commerce (*Sprout v. South Bend*, 277 U. S. 163, 72 L. Ed. 833, 62 A. L. R. 45, 48 S. Ct. 502), it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining

them and of regulating the traffic thereon (*Kane v. New Jersey*, 242 U. S. 160, 168, 169; 61 L. Ed. 222, 227, 228; 37 S. Ct. 30; *Clark v. Poor*, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702; *Sprout v. South Bend*, supra, 169, 170 of 227 U. S., 48 S. Ct. 502. As such a charge is a direct burden on interstate commerce the tax can not be sustained unless it appears affirmatively, *in some way*, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. *This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 72 L. Ed. 551, 48 S. Ct. 230, *or by the express allocation of the proceeds of the tax to highway purposes*, as in *Clark v. Poor* supra, or otherwise. *Where it is shown that the tax is so imposed it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory*". (Italics supplied)

See also *Ingels v. Morf*, 300 U. S. 290–296, 81 L. Ed. 653; *Morph v. Bingaman*, 298 U. S. 407–414, 80 L. Ed. 1245–1249.

The language of the court is so clear as to leave no doubt as to what is the true rule in such cases. As to interstate carriers, it must appear that the tax or charge is demanded as reimbursement for the expense of providing particular facilities used—in this case highways. This showing, however, may be supplied by the form of the statute itself, or the nature of the imposition of the tax such as a mileage tax directly proportioned to the use of the highway or by an express allocation of the proceeds of the tax to highway construction, and when such affirmative showing is supplied in any of the ways indicated, the burden is cast upon the taxpayer to show that the charge bears no reasonable relation to the privilege of using the highway, or is discriminatory as against the interstate carrier.

Attention has already been called to the fact that no distinction is made by the provisions of the Act between intrastate and interstate carriers. They are all treated exactly

alike and pay the same amount, provided only that they fall within the same class. There is not the slightest suggestion of an intentional discrimination as against the interstate carrier. Only one fee is exacted by the statute and when that fee or charge is paid the carrier's privilege of using all the highways of the State of Georgia is unlimited. Attention further has been called to the fact that the statute, by its terms, states at least in effect that the Maintenance Tax is levied for the privilege of using the public roads of the State of Georgia, and, in addition thereto, all of the funds collected are allocated to the United States Rural Post Roads Division of the State Highway Department, to be expended through the Director thereof and prorated among the several counties of the state according to the number of miles of rural post roads in such counties.

In view of the form of the statute and the allocation of the funds derived thereunder, we take it that under decisions of the Court the burden rests upon appellant to show, not by conclusions or generalities, but by well pleaded facts, that the charge as laid bears no reasonable relation to the privilege granted.

Furthermore, in view of the presumption indulged in favor of the constitutionality of the Act, the burden is a heavy one.

Dayton Power & Light Co. v. Public Utilities Commission, 292 U. S. 290.

The showing must be a convincing one.

Coy v. Linder, 183 Ga. 583; *Lindhimer v. Illinois Bell Telephone Co.*, 292 U. S. 151.

It must be such as to compel conviction.

Georgia Railway Co. v. Railroad Commission of Georgia, 262 U. S. 634.

The showing must be so clear, satisfactory and convincing as to leave no doubt.

L. & N. Ry. Co. v. R. R. Commission, 208 Fed. 35, 42.

3. APPELLANT FAILS TO SHOW THAT AMOUNT OF TAX BEARS NO REASONABLE RELATION TO PRIVILEGE GRANTED.

In the statement of points to be relied on in this Court (R. 41, paragraphs 2, 3) it is in effect contended that the Act is repugnant to the commerce clause of the Constitution of the United States for the reason that the amount of the tax bears no reasonable relation to the use made of highways of the State and we wish to discuss briefly that contention here.

The question, of course, is to be considered in the light of the general principles above stated. Further, the question is to be answered, not on the basis of what is the value of the privilege actually enjoyed by appellant, but the court must determine whether or not, under the allegations of fact as set out in the affidavit of illegality, it clearly and convincingly appears that the charge complained of bears no reasonable relation to the privilege granted. This observation is made because of the contention of appellant that its use of the highways of Georgia is, in a sense, restricted. That statement, however, if true, is immaterial. A similar question was presented and answered in the case of *Aero Mayflower Transit Co. vs. Georgia Public Service Commission*, 295 U. S. 285, 293; 79 L. Ed 1445. In that case a flat rate tax was involved and it was contended by the carrier that it used the highways of the state infrequently and should not be charged the same amount as those who used the highways regularly. With reference to the contention made, the Court said:

> "The Appellant urges the objection that its use of roads in Georgia is less than that by other carriers engaged in local business, yet they pay the same charge. The fee is not for the mileage covered by a vehicle. There would be administrative difficulties in collecting on that basis. The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or appressive in a burden so imposed. Cf. *Clark v. Poor*, supra, *Hicklin v. Coney*, supra. One who receives a privilege without limit is not wronged by his

own refusal to enjoy it as freely as he may."

A flat rate fee only is exacted under the provisions of the Act. The privilege granted to the carrier is unlimited. If the use or enjoyment of the privileges is restricted in any sense, the fault does not lie with the Act, but with the carrier. In part, at least, the restricted use is a matter of choice and convenience to it, and while it is alleged that appellant operates under certificates of convenience issued by the Interstate Commerce Commission, it does not appear that it has sought or desires to operate over any routes except those particularly specified in the affidavit of illegality.

While we contend that the question of reasonableness of the fee exacted must be determined with reference to and in comparison with the value of the privilege granted and not merely with reference to the value of the privilege actually used, nevertheless, since appellant makes the contention that it is limited or restricted to the use of certain highways only, we desire to examine for a moment the scope of the privilege actually enjoyed by appellant as disclosed by its affidavit of illegality.

The principal office of appellant is Akron, Ohio, (R. 3). Involved in this case is one two-ton truck (R. 2). In the transcript of record, pages 12 and 13, there are set out the routes in the State of Georgia over which appellant may operate said two-ton truck. For instance, in proceeding south into the State of Georgia, at the Georgia-Tennessee line near Chattanooga, appellant finds a substantial paved highway with substantial bridges upon which to enter with its truck and cargo and from that point may proceed by Ringgold, Dalton, Calhoun, Cartersville, to Atlanta, and thence to Newnan, Hogansville, LaGrange and West Point (located on the Alabama line), or if appellant prefers and finds it convenient to do so in the operation of its business, it may proceed to Jonesboro, Griffin, Barnesville, Forsyth and Macon, or from Atlanta to McDonough, Jackson, Forsyth and Macon, or from Atlanta to Griffin, Zebulon, Thomaston, Americus and Albany. We will not list or refer to all highways over which

appellant may operate under permits shown to be held by it. Suffice it to say that practically every important market and trading center in the State of Georgia is available to it and every shipper in every such market and trading center is a potential customer. It is transacting its business for hire and the highways at its disposal are substantial highways, so that appellant may transport its trucks and cargo with a maximum of speed and a minimum of strain on its equipment. It is unlimited as to the extent of the use of the highways. It may operate the particular truck involved over these highways, or anyone of them twenty-four (24) hours per day, during every day of every week throughout the entire year. Its speed of operation and maximum load are limited only by the general law.

So much then for the scope of the privilege which appellant enjoys. And what is shown to be the cost?

In the affidavit of illegality there are several allegations respecting the total amount which the State of Georgia collects on its gasoline tax, its automobile registration fee, its $25.00 per year Public Service Commission regulatory fee and the maintenance tax here involved. Appellant, however, cannot be the champion of any rights except its own. *Hennefford v. Silas Mason, Inc.*, 300 U. S. 577–588. So the question is what is the amount exacted by the State of Georgia for the privilege of using the highways of the State over which appellant actually operates in the prosecution of its business as a common carrier for hire. The truck involved is a two-ton truck. Accordingly, under Section 3-C, Subdivision 4 of the Maintenance Tax Act of 1937, the annual charge or tax is only $75.00. Appellant is content with other taxes assessed against it by the State of Georgia (R. 9, paragraph 14, Affidavit of Illegality). It complains only of this particular tax and yet the amount exacted for the privilege actually enjoyed is less than twenty-one (21) cents per day. Appellant, however, does not contend, as we construe its affidavit of illegality, that the maintenance tax within itself is excessive, but claims that the maintenance tax is added to other taxes. This fact, however, is immaterial unless it is shown that the

total tax is unreasonable, *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245; 72 L. Ed. 551. And what other taxes are alleged to be exacted of appellant? In the affidavit of illegality it is alleged that a fee of $25.00 is required to be paid for registering with the Georgia Public Service Commission (R. 7). This charge, however, is primarily to pay for policing, regulation and inspection. Only the surplus is paid into the road fund for maintenance and construction. Georgia Code 1933, Section 68–663; *Aero Mayflower Transit Co., vs. Georgia Public Service Commission* 295 U. S. 285; 79 L. Ed. 1445. In addition, there is required a fee of $3.00 for registration and identification charged as against all motor vehicles operated in the State. This fee, too, is primarily for regulation and registration. Georgia Code 1933, Section 68–201 (Georgia Laws 1935, 157). Only the surplus is devoted to the maintenance and construction of highways. Georgia Code 1933, Section 95–1703. It is also contended that the driver's license fee in the amount of $2.00 is exacted but this fee is assessed against the driver and not the owner (Georgia Laws, 1937, 322, 341, 346), and the license fee therefor runs for two years (Georgia Laws 1937, 344), so that the fee is only $1.00 per annum. Appellant also makes reference to the gasoline tax but this tax is assessed against the distributor under the provisions of law, (Georgia Laws, 1937, 167, 174), and further, it is to be noted that there is no provision of Georgia law which requires appellant to purchase gasoline in the State of Georgia. It might purchase its gasoline outside of the State where there is no tax if it desired. But for the sake of argument, let the gasoline tax be added to the other taxes exacted. The allegations of the affidavit disclose that the average amount of gasoline tax paid for road maintenance purposes is $3600.00 per annum (R. 8 Affidavit of Illegality, paragraph 12) and that approximately one hundred (100) trucks are used by appellant in the State of Georgia in the consumption of this gasoline. If it be assumed therefore that the particular truck involved uses in the State of Georgia an average amount of gasoline, then the tax cost of the gasoline so used would be $36.00. Since the burden is on appellant to plead its case clearly, this assumption is fully justified. So that, taking the over all tax cost on this truck for the year for

its use and operation in the State, we have the following: $75.00 maintenance tax; $25.00 registration fee with the Georgia Public Service Commission; $8.00 license and registration tax; $36.00 gasoline tax and $1.00 driver's license, making a total of $140.00 as a charge for regulation, inspection, policing, and for use of the highways of the State of Georgia as a place of business in the prosecution of a private enterprise. The cost per day is less than thirty-nine (39) cents; a nominal sum indeed as compared with the privilege of using without limit the facilities which the State has provided at enormous expense and which are actually at the disposal of appellant.

In support of its contention that the fees exacted bear no reasonable relation to the privilege granted, appellant urges that during the year 1936 motor vehicles operating in the State paid to the State $19,207,909.59 in license and motor fuel taxes, and for the same year the State expended for highway construction and maintenance only $11,127,258.38, of which the Federal Government contributed $3,721,489.90. (R. 10, par. 19, and R. 21, Amendment, par. 4; Appellant's brief, Division VII, "Point C"). We know of no law, State or Federal, that requires the State to expend its highway funds during the same year they are collected, and we find nothing in the affidavit of illegality to indicate that the surplus, if any, for the year 1936 was not expended for highway construction or maintenance, either before or after that particular year.

Certainly it cannot be held that the facts disclose clearly and convincingly that the amount of the exaction bears no reasonable relation to the privilege actually enjoyed, and in the absence of such convincing showing appellant cannot prevail.

It may, of course, be true that the General Assembly could provide a tax more suitably adjusted to the particular business of appellant and its method of conducting the same. The Constitution, however, leaves to the General Assembly the widest discretion in the matter of assessing charges for the

facilities it provides. The Constitution does not require any state to formulate and adopt the best possible system of taxation. A state cannot be expected to enact its statutes with particular reference to every person's business. As was said by Mr. Justice Cardozo in the *Aero Mayflower Transit Company case*, "there would be administrative difficulties in collecting such a tax", and a State is entitled to take that fact into consideration.

See also *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495–531, 81 L. Ed. 1245, 57 S. Ct. 868.

The Act cannot be condemned because another method more nicely adjusted to the business of appellant might actually or theoretically have been adopted by the General Assembly.

Great A. & P. Tea Co. v. Grosjean, 301 U. S. 412, 424, 81 L. Ed. 1193, 1200, 57 S. Ct. 776.

It is submitted, therefore, that the pleaded facts do not show that there is no reasonable relation between the amount of the tax exacted and the value of the privilege granted or actually used.

4. STATUTE NOT REPUGNANT TO COMMERCE CLAUSE BECAUSE TAX USED TO CONSTRUCT OR MAINTAIN ROADS NOT USED BY APPELLANT.

In the statement of points to be relied on (R. 41, Subdivision 1) we are advised that appellant expects to contend that the statute is repugnant to the Commerce Clause of the Constitution of the United States for the reason, as appellant contends, that the proceeds of the tax are to be expended in maintaining roads which appellant does not use.

The contention is without merit. The affidavit of illegality (R. 12, 13) discloses a large number of highways actually used by appellant in the operation of its business as a common carrier for hire. Said highways have been constructed at the State's expense. It is not disclosed by appellant's affidavit

of illegality just who provided the funds to the State for the construction of these highways and we are sure that appellees could not furnish the information. Suffice it to say that the roads have been constructed and that appellant is using them. Certainly it cannot be expected that a tax exacted from any particular carrier must be used by the State in the construction or maintenance of the highways only used by such carrier. Such a statute would involve insuperable administrative difficulties.

A similar contention was considered by the Court first in *Clark v. Poor*, 274 U. S. 554, 557, and again in *Morf v. Bingaman* 298 U. S. 407; 56 S. Ct. 756. In the *Clark case* at page 557 the Court, speaking through Mr. Justice Brandeis, said:

> "It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the commission in the administration or enforcement of the Act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

In the *Morf case*, at page 412 of 298 U. S. (page 758 of 56 S. Ct) the Court answered the contention as follows:

> "As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, the levy of a flat fee not shown to be unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce. See *Clark v. Poor, supra Aero; Mayflower Transit Co. v. Georgia Public Service Commission, supra.*

> "Nor is it important that a part of the fees collected is not devoted directly to highway maintenance, the cost of which the State pays in part from the proceeds of a general property tax. The use for highway maintenance

of a fee collected from automobile owners may be of significance, when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways. *Interstate Transit Co., Inc. v. Lindsey, supra.* But where the manner of the levy, like that prescribed by the present statute, definitely identifies it as a fee charged for the grant of the privilege, it is immaterial whether the State places the fees collected in the pocket out of which it pays highway maintenance charges or in some other."

The Court's holding is directly in point. The statute involved here definitely identifies the fees collected as laid for the privilege of using the highways of the State. Appellant operates over highways which have been constructed and are being maintained by the State from taxes derived from appropriate sources. The highways which appellant uses are facilities provided at the expense of the State of Georgia and whether the State uses the identical taxes collected for repair and maintaining the particular highway so used is wholly immaterial. Appellant cannot refuse to pay for the privilege of using the highways over which it operates on the ground that the fee so charged is expended in constructing or improving other roads which it might but does not in fact use.

See also *Lee v. The State*, 163 Ga., 238; *Wisconsin Allied Truck Owners Association v. Public Service Commission of Wisconsin*, 207 Wis., 664; 242 N. W. 668.

5. STATUTE NOT REPUGNANT TO COMMERCE CLAUSE BECAUSE OF DISCRIMINATION AGAINST CARRIERS FOR HIRE AND IN FAVOR OF CARRIERS NOT FOR HIRE.

In the statement of points to be relied on (R. 42; Par. 4) it is suggested that the statute is repugnant to the commerce clause of the Federal Constitution for the reason, as appellant contends, that the "tax discriminates against carriers for hire in favor of carriers not for hire".

We cannot understand how this fact, if true, is affected by

the commerce clause. Carriers not for hire using the same capacity trucks are equally taxed without regard to whether the operations are interstate or intrastate. The same thing is true with respect to common or contract carriers for hire, and using the same capacity trucks. And while it is true that a carrier not for hire operating interstate does not pay the same amount under the provision of the Act as appellant pays, appellant obviously overlooks the fact that the commerce clause of the Federal Constitution within itself has nothing to say of discrimination or unequal treatment as between a carrier for hire and a carrier not for hire. If appellant has any protection against discrimination as between itself and carriers not for hire under the Federal Constitution, such protection comes from the equal protection clause of the Fourteenth Amendment and not the commerce clause.

6. STATUTE NOT REPUGNANT TO EQUAL PROTECTION CLAUSE OF FOURTEENTH AMENDMENT.

Appellant makes the further contention that the Georgia Statute is unconstitutional, in that, the same is repugnant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States for the reason, as it contends, the tax discriminates against carriers for hire and in favor of carriers not for hire (R. 42; Par. 5 of Statement of Points relied on). The contention is not justified. It can no longer be questioned that a state, through its legislative body, may make classifications of subjects for taxation. The only requirement is that in so doing the classification so made shall have a rational basis. Unquestionably, the General Assembly of Georgia may, for difference of treatment in the assessment of charges, make classification of carriers by a truck and make as one class those operating for hire, either as contract or common carriers and as another class, those carriers operating not for hire. A rational basis for such classification is apparent. The carrier not for hire transports over the highways his own goods or property. He uses the highways only as the circumstances and exigencies of his own business require. His use of the highways is incidental only. While the carrier for hire operates over the highways trans-

porting property of others and charges compensation therefor. He makes the highways his place of business and the natural tendency, of course, will be for him to use the highway more, truck for truck, than does the carrier not for hire.

The Courts of last resort in many cases have held in effect that the classification is justified; that the law making body may even tax the common carrier for hire using the highways and exempt altogether the carrier not for hire. If that can be done, certainly the General Assembly of Georgia, without violating any constitutional right, can make a classification on the basis of those who operate as common carriers for hire and those who operate as carriers of their own goods not for hire and provide a different schedule of charges applicable to the two classes respectively.

Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 57 S. Ct. 868; *Aero Mayflower T. Co. v. Ga. Public Service Commission*, 295 U. S. 285, 55 S. Ct. 709; *Continental Baking Co. v. Woodring*, 286 U. S. 352, 52 S. Ct. 595; *Clark v. Poor*, 274 U. S. 554, 47 S. Ct. 702; *Morf v. Bingaman*, 56 S. Ct., 756, 298 U. S. 407; *Bekins Van Lines v. Riley*, 280 U. S. 80, 82, 50 S. Ct. 64; *Stephenson v. Binford*, 287 U. S. 251, 77 L. Ed. 288, 53 S. Ct. 181; *Raymond v. Holm*, 165 Minn. 215; *State v. King*, ...Me..... 188 A. 775; *People v. Duntley*, 217 Cal. 1150, 17 Pac. (2d) 715; *State v. Lefevre*, 174 Minn. 248; *Hicklin v. Coney*, 290 U. S. 169, 54 S. Ct. 142; *Iowa Motor Vehicle Association v. Board of RR. Commissioners*, 207 Iowa 461; *Holmes v. RR Commission of California*, 197 Cal. 627, 242 Pac. 486; *Collins-Deitz-Morris Co. v. State Corporation Commission*, 154 Okla. 121, 7 Pac. (2d) 125, 80 A. L. R. 561.

See also *Annotations*, 109 A. L. R. 566–569.

CONCLUSION

In conclusion, we wish again to make reference to the opinion of the Georgia Supreme Court in this case. The ruling made by it is based upon many decisions of this Court and other Courts, some of which are cited herein. We think there

can be no doubt but that the Georgia Court correctly decided the case and its judgment should be affirmed.

Respectfully submitted,

M. J. YEOMANS,
Attorney General.

B. B. ZELLARS,
Assistant Attorney General

O. H. DUKES,
Special Assistant Attorney General
Attorneys for Appellees.

Post Office Addresses:
M. J. Yeomans and B. B. Zellars,
112 State Capitol,
Atlanta, Georgia.

O. H. Dukes,
Valdosta, Georgia.

SUPREME COURT OF THE UNITED STATES.

No. 260.—October Term, 1938.

Dixie Ohio Express Company, Appellant, *vs.* State Revenue Commission of Georgia, et al. } Appeal from the Supreme Court of the State of Georgia.

[January 30, 1939.]

Mr. Justice Butler delivered the opinion of the Court.

The question is whether, as applied in this case by the highest court of the State, the Georgia Maintenance Tax Act[1] violates the commerce clause or the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

Appellant is an Ohio corporation engaged exclusively in interstate transportation as a common carrier of property for hire by motor vehicles, including hauling between points in Georgia and points in other States. A certificate of convenience and necessity issued by the Interstate Commerce Commission authorizing appellant's interstate transportation in Georgia,[2] does not extend to transportation over rural post roads, which are roads not included in the state highway system over which United States mail is carried.[3]

Appellant owns for use in its business about 100 pieces of equipment consisting of trucks and tractors with manufacturer's rated capacity of a ton and a half and two tons and trailers having factory weight of 4,000 pounds. If used to haul not for hire, the tax on each ton-and-a-half motor vehicle is $15; on each two-ton vehicle, $30; and on each trailer, $30. But when used to haul either as a common or contract carrier for hire, the taxes are respectively, $50, $75, and $50. § 3.

For the collection of tax on one of appellant's two-ton trucks, the state revenue commission obtained from the superior court of Ful-

[1] Laws 1937, p. 155.

[2] § 206, Motor Carrier Act, 1935, 49 Stat. 551, 49 U. S. C. § 306.

[3] Laws 1937, p. 914.

ton County an execution on which it caused the sheriff to levy upon that vehicle. Appellant gave a bond to the sheriff with an affidavit of illegality.[4] In order to avoid seizure of all of appellant's equipment, the state commission allowed it to deposit in escrow the amount claimed under the Act on account of other equipment and agreed that levy should be made only on the one truck. The commission demurred; the superior court sustained the demurrer and dismissed the affidavit. The supreme court affirmed. 186 Ga. 228.

In addition to the description of appellant's equipment, operations, and use of Georgia highways given above, the statements of the affidavit of illegality, so far as concerns the issues here to be decided, may be summarized as follows:

The Act directs that upon payment of the maintenance tax the director of the motor vehicles division of the state commission shall issue a tag (§ 9), and that the money derived from the sale of these tags shall be allocated to the United States rural postal roads division of the Georgia highway department. § 11. Thus, no part of it is applicable to highways over which appellant operates. The maintenance taxes on its equipment for each year will be about $6,000. In addition, the Georgia laws require it to pay $3 for a license tag[5] and $25 for a public service tag[6] for each vehicle and six cents per gallon of gasoline purchased in Georgia;[7] it annually buys in that State about 90,000 gallons. Two-thirds of the gasoline tax is for maintenance of state aid highways.[8] Appellant hauls in seven States; annually its trucks travel an average of 6,870,000 miles of which 725,000, less than 11 per cent of the total, are in Georgia. The 1936 total taxes collected by Georgia amounted to $30,058,092.68, of which motor vehicles bore $19,207,909.59 in license and fuel taxes.

In conclusion, the affidavit asserts that the tax in question is an unreasonable fee for appellant's use of the roads and is therefore repugnant to the commerce clause, and that it discriminates against carriers for hire in favor of carriers not for hire and for that reason violates the equal protection clause of the Fourteenth Amendment.

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[4] Code 1933, § 92-7301.
[5] Laws 1935, p. 157.
[6] Code 1933, § 68-623.
[7] Laws 1937, p. 174.
[8] Laws 1937, p. 180.

1. Is the Act repugnant to the commerce clause?

With exceptions not material here, it requires that all who own or have exclusive right to use for more than 30 days a motor bus, truck,[9] or trailer "shall pay a maintenance tax for operation . . . upon and over the roads of the State" (§ 1) according to a schedule (§ 3) which specifies the amount of the tax on each vehicle. The Act makes no distinction between vehicles used in intrastate commerce and those used in interstate commerce. It discriminates in favor of equipment used not for hire. It lays upon trucks and tractors taxes graduated according to manufacturer's rated capacities and upon trailers amounts graduated according to factory weights. The tax imposed on appellant is the same as if it operated exclusively in intrastate commerce or carried on both intrastate and interstate transportation.

It is elementary that a State may not impose a tax on the privilege of engaging in interstate commerce. *Sprout* v. *South Bend*, 277 U. S. 163, 171. *Interstate Transit, Inc.*, v. *Lindsey*, 283 U. S. 183, 185. *Gwin, White & Prince, Inc.* v. *Henneford*, (decided January 3, 1939), — U. S. —, and cases there cited; also those cited in the concurring opinion. But, consistently with the commerce clause, a State may impose upon vehicles used exclusively for interstate transportation a fair and reasonable tax as compensation for the privilege of using its highways for that purpose. The applicable principle is stated in *Hendrick* v. *Maryland*, 235 U. S. 610. We there said (pp. 623-624): "In view of the many decisions of this court there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce." That rule has been applied in many cases. See e. g. *Kane* v. *New Jersey*, 242 U. S. 160, 168-169. *Clark* v. *Poor*, 274 U. S. 554, 557. *Sprout* v. *South Bend, supra*, 170. *Aero Transit Co.* v. *Georgia Comm'n*, 295 U. S. 285, 289. *Morf* v. *Bingaman*, 298 U. S. 407, 412. While ordinarily state action is deemed valid

[9] The Act defines "truck" to "include any self-propelled vehicle designed . . . for drawing other vehicles, but having no provision for carrying loads independently, except what are commonly known as farm tractors." § 2B.

unless the contrary appears, we have held that to sustain a charge by the State for the use or privilege of using its roads for interstate transportation, it must affirmatively appear that the charge is exacted as compensation or to pay the cost of policing its highways. *Sprout* v. *South Bend, supra. Interstate Transit, Inc.* v. *Lindsey, supra,* 186. *Ingels* v. *Morf,* 300 U. S. 290, 294.

The scope and language of the challenged enactment unmistakably disclose intention of the State to require payment of compensation for the privilege of operating over its roads the specified vehicles for the transportation of property. It contains no hint of hostility to interstate commerce or of purpose to impose a charge on the privilege or business of interstate transportation. The exaction is not to be deemed offensive to the commerce clause merely because the State, in the conduct of its fiscal affairs, chooses to use part or all of the proceeds for purposes other than the construction, improvement, or maintenance of its highways. *Clark* v. *Poor, supra,* 557. *Morf* v. *Bingaman, supra,* 412.

The affidavit of illegality fails to allege any facts tending to show that a reasonable charge for the privilege is less than the amount exacted for it. Appellant does not claim that the privilege to operate for a year 100 pieces of its equipment over any or all the State's roads is not worth $6,000, the amount of the taxes in controversy. It does not disclose what the taxes in question amount to per truck, tractor, or trailer mile, per ton hauled, or per ton mile, nor does it compare the amount of the taxes with total operating expenses or with operating revenues. The figures furnished indicate that the tax imposed on account of the use of each vehicle amounts to about 20 cents a day and that, on appellant's business in 1936, it was about eight mills per vehicle mile. The amounts paid for license tags, public service tags, and taxes on gasoline are without significance in this case. *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, 251-252. The allegation to the effect that in 1936 motor vehicles in Georgia bore, in license and fuel taxes, over 62 per cent of the total taxes collected by the State is too vague for use in any estimate of or study for the ascertainment of the value of appellant's use, or of its privilege to use, the State's roads.

Appellant's failure to disclose whether it fully availed itself of the privilege to use the roads leaves the figures reflecting actual use without foundation and worthless as a measure or indication

of the value of that privilege. And, in view of the seemingly low charge for the operation of its vehicles per day or mile, its failure to furnish evidentiary details material to the issue of reasonableness makes against its contention that the challenged exactions so exceed the worth of the granted use of the roads that they are to be deemed taxes on the privilege of carrying on its business of interstate transportation and tends to confirm appellee's claim that they constitute pay for the specified operations over the State's roads.

We find that the challenged enactment does not violate the commerce clause.

2. Is the Act repugnant to the equal protection clause? Appellant insists that it is because of the higher taxes imposed on those who haul for hire. But it fails to show lack of facts sufficient to justify the discrimination. In the absence of proof to the contrary, it is to be assumed that the use of the roads by one hauling not for hire is generally limited to transportation of his own property as an incident to his occupation or business and that it is substantially less than that of one who is engaged in the business of common carrier thereon for hire. As hauling not for hire is likely to be occasional and accessory and as hauling for hire is a business the success of which depends on the loading of the vehicles used and mileage made by them, the classification complained of may not be held arbitrary or without reasonable foundation. *Morf* v. *Bingaman, supra,* 413. *Aero Transit Co.* v. *Georgia Comm'n, supra,* 290, 291. *Hicklin* v. *Coney,* 290 U. S. 169, 176, 177. *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 370, 371, *et seq.* *Bradley* v. *Pub. Util. Comm'n,* 289 U. S. 92, 97. *Alward* v. *Johnson,* 282 U. S. 509, 513-514. *Bekins Van Lines* v. *Riley,* 280 U. S. 80, 82. *Packard* v. *Banton,* 264 U. S. 140, 144. Appellant's contention that the Act violates the equal protection clause is without merit.

Affirmed.

Mr. Justice BLACK concurs in the result.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.